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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

F. ENGLISH, Individually and as General Secretary Treasurer of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, DAVE BECK, DANIEL J. MURPHY, JOHN F. CONLIN, SIDNEY L. BRENNAN, JOHN T. O'BRIEN, FRANK BREWSTER, WILLIAM A. LEE, JOSEPH DIVINE, JAMES R. HOFFA, EINAR MOHN, HARRY TEVIS, HAROLD J. GIBBONS, GORDON R. CONKLIN, GEORGE R. MOCK, JOHN J. O'ROURKE, THOMAS E. FLYNN, OWEN BRENNAN, JOHN J. BACKUS, MURRAY W. MILLER and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners*

v.

JOHN CUNNINGHAM, THOMAS G. MANNING, FRANK KENNEDY, ANDREW BOGGIA, GEORGE BECKER, JOSEPH MOLLOY, JOHN MCMANUS, HAROLD WILL, STEVE MILONE, JOHN MCGLYNN, EDWARD MCFARLAND, JOHN OLSEN and HOWARD GALL, *Respondents*

PETITION FOR A WRIT OF CERTIORARI

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No.

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v.

JOHN CUNNINGHAM, THOMAS G. MANNING, FRANK KENNEDY, ANDREW BOGHN, GEORGE BUCKER, JOSEPH MORLOY, JOHN MCMANUS, HAROLD WILZ, STEVE MILONE, JOHN MCGLYNN, EDWARD MCFARLAND, JOHN OLSEN and HOBART GALT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI

The above named petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on July 9, 1959.

THE OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia, dated December 11, 1958, is unreported and is printed in the appendix hereto, p. 1a. The opinion and supplemental opinion of the Court of Appeals, not yet reported, are printed in the appendix, pp. 11a and 50a.

JURISDICTION

The judgment of the Court of Appeals, entered on July 9, 1959, is printed in the appendix, p. 53a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

When an international union, comprising about 900 local unions and other subordinate bodies and about 1,600,000 members, has held a convention at which a new constitution was adopted and new officers were elected; and several members of five of the local unions, claiming that the convention was rigged, bring suit in a federal district court on behalf of themselves and all other members against the international and its officers, seeking an injunction against the effectuation of the constitution and the seating of the officers and an order for a new convention and election to be conducted under judicial supervision; and a compromise is reached by the parties whereby the constitution is provisionally effectuated, the officers are provisionally installed, a Board of Monitors is appointed, the defendants obligate themselves to study specified union problems with the counsel and recommendations of the Board of Monitors and to take specified action where needed, and a new convention is to be called at such time, after one year from the date of the compromise, as is deter-

mined by majority vote of the International's General Executive Board, the monitorship to terminate with the holding of the new convention:

1. Is it within the judicial power of the court, under Article III of the Constitution of the United States, by consent or otherwise, to conduct a broad and continuing investigation of the International and its constituent bodies, for the purpose of bringing to light matters deemed to require regulation or reformation and thereafter conducting hearings to culminate in orders of regulation or reformation; and, if such judicial power exists, may it be applied to a suit in which the case or controversy presented relates only to the validity of the challenged convention under the International's constitution and the right of the membership to have a new convention held?

2. If such authority is within the judicial power, does the principle of judicial self-restraint dictate that it not be exercised?

3. May the consent decree which was entered by the district court to embody the parties' compromise be properly construed to confer upon that court the broad power described in the first question, thereby raising the constitutional issue referred to therein?

4. May the court, without the consent of the defendants, modify the consent decree (a) to make the date of the new convention determinable by the court rather than by the International's General Executive Board; (b) to postpone the effectuation of the constitution until the giving of a notice nowhere provided for in the constitution; and (c) to require the conduct of intra-union disciplinary proceedings under procedures at variance with those specified in the constitution?

STATEMENT

The suit underlying this petition was brought in the United States District Court for the District of Columbia, in September 1957, by the respondents, thirteen members[1] of five New York locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "I.B.T."), against the I.B.T. and its officers. Suing on behalf of themselves and all other members of the I.B.T., the respondents alleged that the defendants had violated the I.B.T. constitution and had rigged the convention to be held in October 1957. They sought an injunction against the holding of the convention and the appointment of masters or receivers to supervise a new convention and the selection of delegates thereto. R. 1, 26.

Respondents failed to stop the 1957 convention *pendente lite*.[2] The convention was held and new officers were elected and a new constitution adopted. Respondents thereupon amended their complaint to seek an injunction against effectuating the acts of the convention and named the newly elected officers as defendants. R. 35. The defendants named in the amended complaint are the present petitioners. On October 16, 1957, petitioners answered the amended complaint, denying substantially all but its formal allegations. R. 38. By a preliminary injunction on Oc-

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[1] One of the plaintiffs, John Cunningham, has since dissociated himself from the group.

[2] The District Court, by a preliminary injunction on September 23, 1957, in effect prohibited the holding of the convention (R. 31), but the Court of Appeals granted a stay of that injunction (R. 34) and the Chief Justice of the United States, sitting as Circuit Justice, denied a petition to vacate the stay. R. 33.

tober 23, 1957, the District Court prohibited the seating of the new officers and the effectuation of the new constitution.[3] R. 51.

The case thereafter went to trial, the parties meanwhile carrying on intensive negotiations in search of a practical compromise. Before the time came for petitioners to put in their defense, a compromise was reached whereby the preliminary injunction was to be dissolved, the acts of the 1957 convention were to be effectuated, and a new convention was to be held after a year, rather than in 1962 as would be the case under the I.B.T. constitution, the exact time to be determined by the new General Executive Board of the I.B.T. It was agreed also that the new officers would meanwhile review specified union problems with the counsel and recommendations of a Board of Monitors—e.g., accounting and financial procedures and local unions in trusteeship. The new officers undertook to establish such financial procedures where needed and to restore trusteed locals to autonomy as speedily as might be consistent with the interest of the membership. To permit the new officers to be installed, so that they could accept the compromise on behalf of the I.B.T., the District Court dissolved its preliminary injunction on January 23, 1958. R. 56. The compromise was then embodied in a consent decree which the District Court adopted on January 31, 1958. R. 58; appendix, p. 38a.

The decree named as members of the Board of Monitors Mr. Godfrey P. Schmidt, nominated by respondents, Mr. L.N.D. Wells, Jr., nominated by petitioners,

[3] The Court of Appeals, on November 4, 1957, modified that preliminary injunction in respects not here pertinent. R. 54.

and Judge Nathan Cayton as chairman, jointly nominated by respondents and petitioners. "For several months the parties operated under the consent decree with apparently perfect harmony and very satisfactory progress was made." R. 788-96, 833.

In May 1958, Judge Cayton resigned as chairman of the Board of Monitors and was succeeded by Mr. Martin F. O'Donoghue. Soon thereafter difficulties arose. The Board of Monitors, under the majority control of Messrs. O'Donoghue and Schmidt, departed from its previous practice of counselling with petitioners and began to issue orders. Moreover, the Board of Monitors began to expand the scope of its activities beyond the literal limits of the consent decree, undertaking what it chose to call a "general housecleaning" of the I.B.T. To obtain judicial sanction of their expanded activities, the majority of the Board of Monitors filed in the District Court a petition "for Construction, Reformation and or Modification of the Consent Order and for Instructions and Orders of Compliance." R. 64. A similar petition was thereafter filed on behalf of the respondents. R. 99.

On December 11, 1958, the District Court rendered its Memorandum Opinion (R. 164; appendix, p. 1a) holding that the Monitors possessed mandatory rather than recommendatory powers and that their authority extended to "general housecleaning" of the I.B.T. On February 9, 1959, the District Court entered its

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[1] E.G., most of the "trusteed" locals had already been or were in the process of being restored to autonomy when the program of restoration was suspended at the request of the Board of Monitors. R. 793-94. Another significant reform was the elimination of the so-called "paper locals." R. 794.

order (R. 281; appendix, p. 44a) requiring, *inter alia*, that petitioners comply promptly and fully with specified "Orders of Recommendation" theretofore issued by the Board of Monitors and with all future "Orders of Recommendation that are reasonable and relevant to the basic purposes of the Consent Decree" and modifying the consent decree to prevent the calling of a new convention until such time as might be recommended by the Monitors and approved by the court.

Petitioners appealed from this order to the Court of Appeals and sought a stay of its execution, which was granted on March 31, 1959. On June 10, 1959, the Court of Appeals issued its opinion (R. 680; appendix, p. 11a) reversing in part and affirming in part the District Court's order and, on July 9, 1959, entered a supplemental opinion and the judgment which petitioners now seek to have reviewed. R. 760, 764; appendix, pp. 50a, 53a.

The Court of Appeals rejected the District Court's holding that the Board of Monitors possessed mandatory powers. It held, however, that petitioners have a wide variety of "definite obligations" under the consent decree, that the Monitors may make recommendations to petitioners in the areas of those obligations, and that the District Court, after giving petitioners an opportunity to be heard, may order petitioners to perform their obligations by carrying out the Monitors' recommendations. Accordingly, the Court of Appeals, though reversing the requirement of obedience to future "reasonable and relevant" recommendations, upheld, in substantial part, so much of the District Court's order as required compliance with the orders of recommendation already made. As

to the date of a new convention, the Court of Appeals reversed so much of the District Court's order as made the date dependent upon the Monitor's recommendation and ordered instead that the date be determined by the District Court.

Petitioners sought a stay of the judgment of the Court of Apeals, which that court denied on July 15, 1959. R. 782. On July 20, 1959, petitioners applied for a stay to Mr. Justice Frankfurter, sitting as Circuit Justice. That application was denied in a written opinion on August 4, 1959.

Mr. Justice Frankfurter noted "the candid acknowledgment of the Chairman of the Board of Monitors and counsel for plaintiffs that serious legal questions are at stake" and the recognition "by all concerned" that the judicial supervision of the I.B.T. here involved "is an unusual manifestation of equity powers." He denied the stay, however, solely because he concluded that no irreparable injury could occur "before this Court could pass on a petition for certiorari," stating that, if he concluded otherwise, he "would feel constrained to grant the stay." See slip opinion of Mr. Justice Frankfurter, pp. 2, 3, 4.

REASONS FOR CERTIORARI

Introductory

This case is of far-reaching significance, not alone because of the serious impact it has upon the interests of the 1,600,000 members of the largest trade union in the western hemisphere, but also because of the "serious legal questions" which Mr. Justice Frankfurter noted it poses. Those questions, as will be more fully set

forth hereinafter, affect the extent of the judicial power under Article III of the Constitution of the United States; the propriety of the exercise of judicial power; the permissible scope of judicial interference in the internal affairs of labor unions; and the unilateral modifiability of consent decrees, a matter having great bearing upon the utility of such decrees as an instrument of law enforcement in the antitrust field.

I. As Construed by the Court Below, the Consent Decree Was Beyond the Judicial Power of the District Court Under Article III of the Constitution of the United States.

The court below has construed the consent decree, entered in compromise of respondents' suit for a new convention, as imposing upon petitioners a great range of obligations. The obligations thus held to have been imposed, contrary to the plain meaning of the decree as petitioners submit it must be read (see Point III, *infra*), relate to such matters of internal union management as the effectuation and dissolution of mergers of local unions, the prosecution of intra-union disciplinary proceedings against local and international officers for alleged wrongdoing long antedating the decree, the imposition of new trusteeships on locals now autonomous, the control of welfare funds under joint union-employer management, and such unconstitutional interference with local union independence

[1] Petitioners, although mindful of the desirability that a petition for certiorari be as brief as possible and be a statement of reasons for granting the petition, rather than an argument in support of the legal contentions, respectfully submit that the novelty and complexity of the issues here presented require a more detailed statement than would ordinarily be justified. They therefore request the indulgence of the Court for the length of this petition and the amount of argument it contains.

as the postponement of their elections and the imposition upon them of extra-constitutional election qualifications and election controls.

Having imposed these obligations upon petitioners, the court below then construed the consent decree as conferring upon the District Court authority to conduct, through the Board of Monitors as officers of the court, a far-ranging and continuing investigation of the I.B.T. and its almost 900 constituent locals and other subordinate bodies, located in judicial districts all over the United States and some even in Canada, reaching into any area of union affairs bearing any relation to the aforesaid obligations. The purpose of this investigation is to bring to light, very much as the Senate Select Committee on Improper Activities in the Labor or Management Field (the "McClellan Committee") undertook to do, allegedly illegal or otherwise undesirable practices and conditions within the vast union organization. Thereafter, with respect to any of such practices or conditions as to which the court below has held petitioners to have obligations to take corrective action, the District Court may hold hearings and, upon determining the existence of the practice or condition in question and the applicability to it of any of those obligations, order petitioners to take such action as the court may deem necessary.

The court below has thus held that the District Court has the power to conduct a broadly ramified investigation of one of the largest voluntary associations in the world *for the purpose of discovering what, if any, justiciable controversies may be extracted for decision*. Neither the court nor the parties can predict, in advance of the investigation, the nature of the controversies to be submitted for adjudication. The function

assigned to the District Court is one that looks not toward adjudication of a definite case or controversy, but rather toward some as yet undetermined system of regulation of the complex affairs of the I.B.T. It is a legislative rather than judicial function. Indeed, it is precisely the legislative function which the McClellan Committee has purported to perform over the past two years. If the underlying matrix of facts in this case is, as some witnesses before the Committee, untested by cross-examination, have portrayed it, that there have been improprieties or illegalities in the administration of the affairs of locals or other subordinate bodies of the I.B.T. in Pennsylvania, Missouri, Michigan, Tennessee and Alaska, there is unquestionably presented a legitimate field for legislative action. Such action has now been taken. See, e.g., Pub. L. No. 86-257, 86th Cong., 1st Sess. (Sept. 14, 1959). It is worth noting, in passing, that the consent decree in the instant case has been construed as conferring upon the District Court more sweeping regulatory powers than Pub. L. No. 86-257 confers upon the Secretary of Labor.

If the regulatory function thus assigned to the court is beyond the judicial power under Article III of the Constitution of the United States, it cannot have been conferred by consent of the parties. *United States* v. *Ickes*, 84 F. 2d 257, 260 (D.C. Cir. 1936). It has been observed that an attempt by an antitrust consent decree to regulate an industry and its practices would raise "grave problems of legal propriety and legal power." Katz, *The Consent Decree in Antitrust Administration*, 53 Harv. L. Rev. 415, 446 (1940). The case or controversy to which the judicial power extends in such a case is whether or not the defendants have violated the antitrust laws. Reformation or regulation of defend-

ants' affairs beyond that point is essentially a legislative, rather than judicial, problem. So this Court has held in *United States* v. *New York Coffee and Sugar Exchange*, 263 U.S. 611, 621 (1924), where an attempt to regulate the exchange to eliminate the possibility of future wrongdoing was said to be "legislative and beyond [judicial] power." The attempted exercise of such regulatory authority in other analogous situations has likewise been held to transcend the limits of judicial power. *Honolulu R. T. & L. Co.* v. *Hawaii*, 211 U.S. 282, 289 (1908); *Central Kentucky Natural Gas Co.* v. *Comm'n*, 290 U.S. 264, 271-72 (1933).

If, notwithstanding the foregoing, it should be thought that the function here assigned to the District Court might in some conceivable situation be encompassed within the judicial power, the circumstances of this case preclude such a conclusion. As has been shown, the single issue presented in this case was whether the 1957 I.B.T. convention should be invalidated for alleged constitutional violations. The relief sought was that the court enjoin the effectuation of the acts of that convention and direct a new convention with judicial supervision of selection of delegates and balloting at the convention. The respondents even specified in their prayer that, but for such limited judicial supervision, there was not to be imposed "on any member or subordinate body of the International organization the judgment or preferences of" court appointed officers. R. 27. The allegations of the complaint of constitutional violations by a number of local or International officers were made, as a reading of the complaint shows, merely as a basis for a legal conclusion that to require respondents to exhaust their intra-union remedies would be futile. Whether or not

those alleged violators should be disciplined, however, was not part of the controversy presented for adjudication. Beyond the question whether the 1957 convention should be invalidated and a new one held, there was no case or controversy before the court.

As Judge Goodrich said in *Webster Eisenlohr, Inc. v. Kalodner*, 145 F. 2d 316, 319-20 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945):

> "The judicial power is limited to deciding controversies. That has been its function historically; that is its function under the Constitution of the United States. No doubt a great deal goes on in the world which ought not to go on. If courts had general investigatory powers, they might discover some of these things and possibly right them. Whether they would do as well in this respect as officers or bodies expressly set up for that purpose may be doubted, but until the concept of judicial power is widened to something quite different from what it now is courts will better serve their public function in limiting themselves to the controversies presented by parties in litigation."

By no stretch of construction, in this limited suit by thirteen members of five New York locals of the I.B.T. seeking a new convention, was there "presented by parties in litigation" any case or controversy requiring what amounts to a broad legislative inquiry into the affairs of all the other locals and subordinate bodies of the I.B.T.

The exercise of such regulatory authority is all the more incongruous where, as here, it attempts to adjudicate the rights of local unions and their officers not themselves parties to the suit or subject to the court's jurisdiction. The court below thereby violated the

settled limitation that a court has no power to adjudicate the rights of persons not before it. *Mallow v. Hinde*, 12 Wheat. 193, 198 (1827); cf. *Pennoyer v. Neff*, 95 U.S. 714 (1878); cf. 3 MOORE, FEDERAL PRACTICE (2d ed. 1948), pp. 2146-47.

II. Even if the Decree, as Construed by the Court of Appeals, Was Within the Judicial Power, It Violates the Principle of Judicial Self-Restraint

It is a well established principle that the internal affairs or determinations of a voluntary association are not to be interfered with by the courts except in special circumstances showing violation of the rights of members under the association's constitution. *Green v. Obergfell*, 121 F. 2d 46, 55-56 (D.C. Cir. 1941). By a corollary principle, such judicial intervention as is required should be kept to a minimum. See Chafee, *The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 993, 1027 (1930). These principles apply with special force to labor unions, as to which Congress, in the Norris-LaGuardia Act and the National Labor Relations Act, has expressed a policy against gratuitous interference. See *Green v. Obergfell*, 121 F. 2d at 68-69. Even in review of orders of the National Labor Relations Board, this Court has held, Congress did not intend that the courts should try alleged violations of the National Labor Relations Act "not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found." *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 435 (1941); see also *International Brotherhood of Teamsters v. N.L.R.B.*, 262 F. 2d 456, 463 (D.C. Cir. 1958).

The illegality on account of which judicial interference was here sought and the only matter in con-

troversy was the alleged rigging of the 1957 convention. The only judicial interference that was sought was the undoing of that convention and the holding of a new one under supervision of the court. And, as already pointed out, the prayer for relief explicitly limited the judicial interference that was sought to the establishment of fair election procedures and the supervision of balloting, the judgment or preferences of the court's officers not to be imposed upon the union in any other respect. R. 27. It would seem, therefore, that the foregoing principles of non-interference should have dictated that the court restrict itself to bringing about the earliest possible new elections under judicial supervision and under fair procedures.

As the Court of Appeals construes this decree, the District Court, far from limiting its interference to the alleged illegality which was the subject of the suit, is to undertake a continuing supervision of the internal affairs of this large trade union, in derogation of the members' right of self-government, for the purpose of investigating any complaint that may come to its attention, holding hearings on each such complaint and issuing orders which it deems appropriate. This jurisdiction is to continue until the District Court is satisfied with every facet of the I.B.T.'s affairs. Only then is the court to permit the holding of the new convention which was the object of the suit.

By this construction of the consent decree, the relatively simple lawsuit seeking a new convention can swell and multiply until it absorbs so disproportionate a share of judicial time and facilities as to impair the administration of justice in all other cases. Moreover, since no greater judicial power can be exercised by consent than without it, *United States* v. *Ickes*,

supra, if this consent decree, as construed below, was a proper exercise of judicial power by the District Court for the District of Columbia, that court can anticipate a constant stream of litigation looking toward similar relief against others of the numerous labor unions having their central organizations in Washington, D. C. That Court, already endowed with a much greater range of jurisdiction than other federal district courts, could foreseeably become a special "labor court", to the detriment of all its other business. Even where the parties clearly and explicitly agree upon such a role for the court, the court should reject it as imposing an unduly burdensome task of supervision. See Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1316-17 (1959). The court should be even more reluctant to assume such a role when there has been no explicit agreement by the parties to impose it.

III. The Consent Decree, as Properly Construed, Does Not Confer Upon the District Court the Sweeping Power Found by the Court of Appeals

The construction of the consent decree by the court below raises, as has been shown, a serious constitutional question of judicial power. That construction, moreover, affects deeply the interests of 1,600,000 members of a union. In these circumstances, petitioners, while not unmindful that this Court will not ordinarily exercise its certiorari jurisdiction to inquire into the propriety of a lower court's construction of a decree, respectfully submit, that such an inquiry should here be made.

On the eve of the compromise, the most that the respondents could hope for was that they would succeed in undoing the 1957 convention and in obtaining

an order for a new convention under judicial supervision. Moreover, they had no assurance that the case they had made was persuasive and, of course, they had no way of knowing how strong a case the petitioners could make in defense. They had, therefore, to consider the possibility that they might suffer a complete defeat.

The petitioners, on the other hand, were confronted not only with the alternatives of winning or losing the suit, but also with the fact that, in either event, because of the preliminary injunction, the will of the 1957 convention would be thwarted for an extended period, with the I.B.T. remaining under the superseded leadership of its former General President and under the government of the superseded 1952 constitution.

The consent decree embodied a broad compromise serving the interests of both sides, although both also retreated from their extreme positions. The new officers gained immediate installation in office, but undertook to submit to a new election before completion of the full constitutional five-year term. The respondents, though giving up their demand that the new officers not be installed, were assured that there would be a year's observation of various union affairs by a Board of Monitors and an undertaking by the new officers during that year to study certain conditions within the I.B.T., with the counsel of the Board of Monitors, and take such action as might be necessary. After the expiration of one year the General Executive Board was empowered to call a new convention, the holding of which would terminate the monitorship. Although the General Executive Board could theoretically postone the new convention call beyond the year, their natural desire to rid themselves of the monitor-

ship was relied upon to induce them to call the convention at the earliest possible moment. Moreover, the fact that the Board of Monitors was to spend a full year looking over the shoulders of the officers into various aspects of union affairs, coupled with the requirements of paragraph 9 of the decree (Appendix, p. 42a), gave the respondents substantial assurance that the new convention would be fair and constitutional.

Had petitioners confessed judgment or defaulted, a decree would have been entered enjoining the effectuation of any of the acts of the 1957 convention and ordering a new convention to be conducted under the eyes of court-appointed officers and to be attended by delegates selected according to procedures devised by those officers. Beyond this, there would have been no judicial interference in the internal affairs of the I.B.T., or its constituent locals.

The consent decree, as was recognized by all the parties and by the District Court, embodied a compromise, not a surrender. R. 996-97, 1009-11, 1013. As respondents' counsel acknowledged before the District Court, respondents obtained under the decree *less* than they had sought by their complaint. R. 1114. The construction of the consent decree by the Court of Appeals, however, is grounded on an assumption that the petitioners, in compromising the suit, consented to the imposition upon them of far *greater* restraints than would have been suffered through unconditional surrender. That court has construed the consent decree as obligating the petitioners to conduct a judicially supervised overhauling of the I.B.T. and its constituent locals; and it has held that, so long as the petitioners have not fulfilled that obligation to the

satisfaction of the District Court, that court may (1) prevent the calling of a new convention, (2) keep the monitorship in force, and (3) receive reports of the Board of Monitors with respect to any allegedly undesirable conditions they may find and, after affording petitioners a hearing, order them to take whatever action it deems necessary.

It would seem that, if the parties had intended that the I.B.T. be subjected to a long, intensive ordeal by judicial purge, it would not have been very difficult to say so in the consent decree. An examination of the decree shows, however, that the only obligations it places on the petitioners are the following:

1. Under paragraph 4, to recommend to the locals, for adoption whatever by-laws, not inconsistent with the constitution, the Board of Monitors may draft.

2. Under paragraph 5, to review accounting and financial procedures and controls and establish such procedures and controls "where needed"; and to require adherance to recognized fiduciary standards.

3. Under paragraph 6, to be free from conflict of interest.

4. Under paragraph 7, to review and, as speedily as is consistent with membership interests, eliminate local trusteeships.

5. Under paragraph 9, to recommend to the locals that delegates to the new convention be elected by secret ballot and, where practicable, under supervision of an independent agency.

6. Under paragraphs 10 and 14, to pay the fees and expenses of the Board of Monitors and of counsel for the plaintiffs.

7. Under paragraph 12, to provide the Board of Monitors with clerical and technical help.

8. Under paragraph 13, to refrain from reprisals against persons involved in the suit.

9. Under the various provisions giving the Board of Monitors authority to counsel with or make recommendations to the General Executive Board, to receive and consider in good faith such counsel or recommendations.

Nowhere in the language of the decree can there be found an undertaking by the petitioners of any obligation from which the District Court can derive any authority to conduct a protracted, far-ranging investigation of virtually every facet of the affairs of the I.B.T. and its locals and order whatever change it deems desirable, including institution of proceedings for expulsion or other disciplining of local and International officers. Petitioners, by entering into a compromise of a suit challenging the 1957 convention and seeking a new one, have not placed the I.B.T. and all its constituent locals in the hands of a federal judge in the District of Columbia for him to do with as he wills until such time as he thinks he has done enough.

The conclusion of the Court of Appeals to the contrary rests chiefly on paragraph 5 of the consent decree which reads:

> "The General Executive Board in consultation with the Board of Monitors shall review and where needed establish accounting and financial methods, procedures, and controls affecting all funds and properties held, received and disbursed by or on behalf of the [IBT] and its subordinate bodies. All persons having custody or management of

such funds or properties shall be required to adhere to the recognized legal and equitable standards and obligations imposed upon fiduciaries in the handling of such funds and properties."

One would suppose that so extreme, unprecedented and far-reaching an undertaking as the Court of Appeals reads into this language would have been expressed in more explicit terms. Actually, as its plain language shows, paragraph 5 provides only for the establishment of necessary general accounting and financial procedures and controls, including the requirement of adherence to recognized fiduciary standards (presumably to be spelled out in the general procedures and controls to be established). Paragraph 5 thus deals solely with the promulgation of general rules for the handling of funds and properties, as distinguished from any mandate for the enforcement of such rules in individual cases. The second sentence of paragraph 5, on which the Court of Appeals primarily relied, must be read in conjunction with the first sentence, and, so read, it is clear that it merely amplifies the general language of the first sentence with respect to the standards to be required in the handling of funds and properties. Furthermore, the second sentence is clearly prospective, and, therefore can in no event support the position of the Court of Appeals that it is a mandate for the institution of disciplinary proceedings on account of alleged acts committed long before the entry of the consent decree. The provision is that persons having custody or management of funds or properties "shall be required to adhere" to recognized fiduciary standards and obligations, not that they shall be required *to have adhered* to such standards.

So alien to the language of the decree[6] and the circumstances of its adoption is the construction below that one must conclude that the court was not construing the decree, but rather "substantially changing the terms of a decree to which the parties consented without any adjudication of the issues", something which this Court has said it may not do. *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959).

The action of the court below, whether it be called construction or modification of the consent decree, amounted, as has been shown, to imposing upon petitioners obligations which they had never agreed to assume, which were not contemplated by the parties and which far exceed anything petitioners could have suffered through an absolute confession of judgment. As will appear from the following section of this petition, the court below then proceeded to seize upon petitioners' failure to carry out some of the obligations thus imposed upon them, as a basis for depriving them of their right to call a new convention.

IV. The Court Below Has Made Unwarranted Unilateral Modifications of the Consent Decree

Paragraph 8 of the consent decree provides:

> "The Board of Monitors appointed herein shall serve as such for at least one year and thereafter until a new convention of the [IBT] is held at

[6] It is submitted, for example, that no twisting of the language of paragraph 5 of the decree can possibly make it mean that the District Court has authority to order the I.B.T. to proceed against a suspended business agent of one of its locals in connection with his alleged activities in organizing an independent union in a jurisdiction entirely different from that of the I.B.T. Yet, that is one of the powers that the Court of Appeals has read into the paragraph. Appendix, p. 57a.

which convention officers are duly elected and sworn . . .

"A new convention and election of officers shall be held at any time after the expiration of one year from the date of this order when the General Executive Board by majority vote shall resolve to call such convention and hold such election . . ."

The judgment below modifies this paragraph to provide that the new convention and election shall be held at such time as "the District Court shall determine that such convention and election be called and held." Appendix, p. 59a.

This modification, deprived the petitioners of their right to bring about, after one year, a termination of the monitorship and a substitution of a regular constitutional administration of the I.B.T. for the provisional administration set up under the consent decree. The whole nature of the compromise was changed by transferring this right from the petitioners to the District Court.

The validity of this modification is a question of grave importance not only insofar as it affects the interests of the members of the I.B.T., but also as it bears upon modifiability of consent decrees in other cases, notably in antitrust cases, where the consent decree has become a very important instrument of law enforcement. See Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 Yale L. J. 1391 (1959); Note, *The Consent Judgment As An Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314 (1959); Katz, *The Consent Decree in Antitrust Administration*, 53 Harv. L. Rev. 415 (1940); Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 Harv. L. Rev. 386 (1940).

The underlying principle determining modifiability of consent decrees was set forth by this Court in *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). There can be no unilateral modification of a consent decree that protects "rights fully accrued upon facts so nearly permanent as to be substantially impervious to change . . ." The decrees that are unilaterally modifiable are only "those that involve the supervision of changing conduct and conditions and are thus provisional and tentative." An example of a modifiable decree is presented by *Coca Cola Co.* v. *Standard Bottling Co.*, 138 F. 2d 788 (10th Cir. 1943), where the defendant was freed from a consent decree enjoining use of the name "cola", because the facts upon which the plaintiff's right had been based—exclusive ownership of the name—had changed. But where the facts upon which the protected rights depend have not changed, the only change being in the plaintiff's evaluation of the relief agreed upon, there are no grounds for modification. *United States* v. *Atlantic Refining Co.*, *supra*; *Hughes* v. *United States*, 342 U.S. 353, 357 (1952); *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). Even where the plaintiff is the United States, the fact that the change it seeks is one which would more effectively protect the litigated right and one which it could have obtained originally through litigation is no reason to free it from the bargain it made. *Ibid.* If hindsight is unavailable to the United States in such a case, it follows *a fortiori* that parties to purely private litigation are bound by consent decrees entered into in good faith.

The right asserted by respondents in this case was the right to a new convention to be conducted under the

eye of the court. The fact upon which the asserted right depended was the alleged rigging of the 1957 convention. That fact, if true, gave rise to the asserted right to have a new convention held and the right was fully accrued. The alleged rigging, if it occurred, was all in the past and it consisted of absolutely immutable events. The fully accrued right to a new convention, resting on the immutable alleged events, is what was settled by the consent decree. No post-decree event would affect the right in any way. The parties are, therefore, to be governed by the decree they bargained for and the court may not modify the decree to change the relief upon which they agreed.

Even where there is a post-decree change in the circumstances it does not follow that there may be a unilateral modification of the decree. As this Court said in *Swift & Co.*, 286 U.S. at 119:

> "Nothing less than a clear showing of grievous wrong evoked by *new and unforeseen* conditions should lead us to change what was decreed . . . with the consent of all concerned." (Emphasis supplied.)

The post-decree events upon which this unilateral modification is based are that the petitioners have in some respects purportedly failed to carry out the obligations imposed upon them by the decree, or, as the District Court had put it, that they have failed to comply with "reasonable and relevant orders of recommendation" of the Board of Monitors. By no stretch of the imagination, however, can such events be held to have been "unforeseen" when the decree was made. The record shows that disagreement between the petitioners and the Board of Monitors was within the contemplation of the parties. The initial draft of the decree, as proposed by the respondents, had provided

for "trustees" empowered to "supervise the officers" of the I.B.T., "enforce" the constitution and "require compliance." R. 992. That draft was rejected in favor of the present decree providing for a recommendatory role for the Board of Monitors with discretion over the administration of I.B.T. affairs left in petitioners, its constitutional officers. Since the possibility of petitioners' non-compliance with monitorial recommendations was one of the conditions in existence when the decree was made and the parties consciously chose to leave ultimate discretion in petitioners, the post-decree fact of non-compliance cannot justify modifying the decree in effect to require compliance.

Default by an antitrust defendant in performance of what a consent decree requires of him, does not relieve the plaintiff from the disposition to which he has agreed in the consent decree, "since the possibility of default was not a circumstance of which he was then unaware and which would have impaired the validity of the agreement." Note, *The Consent Judgment As An Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1318 (1959). To be sure the Court which enters an antitrust consent decree maintains supervision of the defendant's conduct. But if that conduct becomes violative of the decree, the remedy is a contempt proceeding, not a modification of the decree to require him to do something different from what was bargained for. The view taken by the Court of Appeals—that a consent decree becomes unilaterally modifiable, rather than merely enforceable, when the defendant violates it—would throw open to unilateral modification virtually every consent decree heretofore entered in antitrust cases. This would presage the abandonment of the consent decree as a device in antitrust law enforcement.

If the Court of Appeals were correct, the books should abound with instances of unilateral modifications of antitrust consent decrees. Such modifications are, however, a rarity in the law, because they require a showing of substantial change *in the circumstances which gave rise to the protected right*, not merely the occurrence of events otherwise affecting the parties' interests. Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 Yale L. J. 1391, 1393-97 (1959). To permit modification where their interests are otherwise affected, parties have developed the practice of specifying in decrees the contingencies upon which there may be modifications. *Id.* at 1393; see cases cited at 1396-97. Nothing in the instant decree can be read as providing that the right of the General Executive Board of the I.B.T. to call a new convention is to be suspended in the event that the respondents decide, and the District Court agrees with them, that they should have held out for a longer monitorship than was specified in the decree. Indeed, the only fair reading of the decree is that the termination of the monitorship at any time after a year from the date of the decree is left to the sole discretion of the General Executive Board.

Also militating against this modification of the consent decree is the fact that it thwarts, rather than effectuating, the decree's basic purpose. *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942).

The purpose of the suit was to obtain a new convention. The clear and unmistakeable purpose of the consent decree was to assure the speediest possible convention call to "be issued in accordance with the International constitution by the General Executive Board." Appendix, p. 42a. Whatever was to be done

under the decree was to be done in a manner "guaranteed by", "pursuant to", "not inconsistent with", "specified by", "in accordance with", or "in strict and literal compliance with" the I.B.T. constitution. See paragraphs 3, 4, 8 and 9 of the decree, appendix, pp. 40a, 42a.

Paragraph 1 of the consent decree provides that the 1957 constitution "shall forthwith go into effect, provisionally in accordance with the following paragraphs of this decree." Appendix, p. 39a. Under Article III, Section 1 of that constitution, the convention is "the supreme governing authority" of the I.B.T. and has "the plenary power to regulate and direct the policies, affairs, and organization" of the I.B.T. Such convention is required to be held every five years at such time and place as may be designated by the General Executive Board upon the recommendation of the General President.[7] To provide for contingencies requiring convention action earlier than the regular convention date, the constitution, in Article IX, Section 7, entrusts the General Executive Board with discretion to call, by majority vote, a special convention.[8] This discretion to convoke a special convention, which was provided for in the 1952 constitution as well,[9] is not made delegable by the General Executive Board. Indeed, as distinguished from the regular convention, the date of a special convention is not even subject to the General President's recommendation. Those of the petitioners who constitute the I.B.T.'s General Executive Board, had constitutional

[7] Stipulation filed herein September 18, 1959, Exhibit B, p. 6.

[8] *Id.*, p. 35.

[9] *Supra* note 7, Exhibit A, p. 29.

discretion to meet the problems posed by this litigation by calling a special convention and had no authority to consent to a transfer of that discretion to anyone else. The purpose of the consent decree, therefore, cannot have been to make a transfer of discretion to the District Court to which the petitioners had no authority to consent.

The court below has also made other unilateral modifications which thwart the decree's basic purpose of constitutionalism. It imposed upon the I.B.T., for example, an election-eligibility rule at variance with the provisions of the I.B.T. constitution. That the court may have considered its action in this respect merely an interpretation or construction is of no consequence, for a substantial change in the parties' agreement is a modification, whatever the court may call it, and may not be made without consent. *United States v. Atlantic Refining Co.* 360 U.S. at 23.

The 1957 constitution of the I.B.T. provided, in an amendment to Article X, Section 5(c), that members whose dues are being checked off by employers, to protect their good standing (and their eligibility for election) against late transmittal of their checked-off dues by their employers, must pay one month's dues in advance.[10] The court below held that this provision is to remain ineffective until notice of its effectiveness shall have been given to the membership in a manner to be agreed upon or, absent such agreement, as is required by the District Court. Appendix, p. 52a.

Section 3 of the decree gives the Board of Monitors counselling authority "in order to insure the enforce-

[10] *Supra* note 7, Exhibit B, p. 38.

ment and protection of all rights" of the membership, including "the right to fair and uniform qualifications to stand for office . . ." It specifies, however, that the rights thus to be ensured and protected are "as guaranteed by the provisions of the International constitution. . . ." Appendix, p. 40a. It follows, therefore, that the election eligibility rule established by the 1957 constitution is in full force and effect and that the consent decree did not undertake to alter that rule by postponing its effectiveness.

The District Court had held that, while the amendment of Article X, Section 5(c) went into effect on January 31, 1958, under the consent decree, "due process" required postponement of its effectiveness until a prescribed notice should be given to the members. Appendix, pp. 7a-8a. It also found the amendment invalid on grounds of "public policy", quite apart from the question of notice. Appendix, p. 9a. The Court of Appeals, while apparently upholding the validity of the 1957 amendment, held that it is ineffective until adequate notice has been given the members.

Whether this holding is based upon "due process", upon "public policy", or upon the court's concept of what is desirable in labor unions' administration of their internal affairs does not appear from its opinion. It is clear, however, that, since no governmental action is involved in this question, the due process clause is inapplicable. See *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, 262 F. 2d 359, 363 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959); *Conrad* v. *International Photographers of Motion Picture Industry, Local 659*, 176 F. 2d 1000, 1003 (9th Cir. 1949);

Schatte v. International Alliance of Theatrical Stage Employees, 70 F. Supp. 1008, 1010 (S.D. Calif. 1947), *affirmed*, 165 F. 2d 216 (9th Cir.), *cert. denied*, 334 U.S. 812 (1948). We submit that concepts of "public policy" and desirability are equally inapplicable to the question whether a union may, by majority vote of a convention of the membership, enact a rule that, from and after the date of enactment, no member not currently paid up on the books of his local shall be eligible for election to office. This is precisely the sort of internal matter which is traditionally held to be controlled by the union constitution, the members' contract of affiliation, and to be beyond judicial interference unless there is a violation of that constitution. *Green v. Obergfell*, 121 F.2d at 55; see also *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958); and see, generally, *Chafee*, *supra* p. 14.

When the 1957 constitution went into effect with the lifting of the preliminary injunction and the entry of the consent decree in January of 1958, the amendment to Article X, Section 5(e) became immediately effective, because there was nothing in the constitution providing otherwise. If the case had gone to trial, the court, upon a proper showing by the respondents, could have held the entire constitution invalid. Absent a showing that the constitution had been invalidly adopted, the court would have had no alternative but to declare the document effective in all respects. It could not have accepted the provisions it liked and rejected those it disliked. Nor could it have injected into the constitution a provision which was not in it, but which the court thought should be in it. And it could not have derived such authority to rewrite the constitution from the fact that the petitioners con-

sented to a decree, for they themselves have no authority, as officers of the I.B.T., to change the constitution adopted by the membership. What they consented to, as has been shown, was the immediate effectuation of the 1957 constitution as adopted by the membership, to remain in full force and effect until resubmission to a new convention. The injection by the court below of a requirement of notice before a part of the constitution can become effective is, therefore, an unwarranted modification of the consent decree.

Another invasion of the integrity of the I.B.T. constitution and, thus, a substantial modification which thwarts, rather than effectuating, the purpose of the consent decree is the imposition by the court below of intra-union disciplinary procedures other than those to which the members have bound themselves by adopting the constitution.

The court, in ordering institution of a trusteeship proceeding against Local 107, requires that a public member be placed on the panel. Appendix, p. 54a. This goes beyond the provisions of Article VI, Section 5(a) of the constitution,[11] and is a substantial departure from the I.B.T. practice of restricting all hearing panels to union members or such members of the union "family" as the House Counsel or the International Economist. R. 534.

In ordering proceedings against I.B.T. Vice President Brennan, the court below requires the employment of "an outside attorney to serve as special counsel in advising the charging party with respect to the preparing and processing of charges and the conduct of

[11] *Id.*, p. 18.

the hearing on charges . . . ." Appendix, p. 55a. Nowhere in the constitution have the members consented to the intervention of outsiders in any of their internal disputes or to the expenditure of their funds for the employment of such outsiders. Indeed Article XVIII, Section 1(b) provides that the party charged may be represented only by a fellow-member.[12] This same limitation has always been applied to the charging party. R. 387. The court, moreover, has undertaken to designate that the charging party shall be either General Secretary-Treasurer English or First Vice President Conlin and that the charging party shall be disqualified to sit in judgment of the charges. Appendix, pp. 55a, 56a. That the charging party is disqualified by bias from sitting in judgment is not questioned. Indeed that principle is written into Article XVIII, Section 1(a) of the constitution.[13] It is another matter, however, when the charging party has no bias, but brings the charge only at the order of the court. Since the charges against Vice President Brennan must be heard by the General Executive Board under Article XVIII, Section 3(d)[14], to require any member of the General Executive Board to bring the charges against his will and then to disqualify him from participating in the Board's deliberations deprives the membership of the I.B.T. of their constitutional right to his services as their duly elected representative on on the governing body of the I.B.T.

The relative ease with which the court below finds it possible to impose modifications on this consent decree may be attributable to that court's conclusion,

[12] *Id.*, p. 68.

[13] *Id.*, p. 67.

[14] *Id.*, p. 71.

expressed in the companion case decided the same day and referred to in its opinion in the instant case, that the decree was not really intended to settle anything.[15] The court agreed with the District Court that "the consent decree 'is not a final settlement of the essential issue but is interlocutory in nature.'" Appendix, p. 65a. It added:

> "No one has been closed out of the present litigation by a dismissal or compromise. The litigation continues. No member of the class has been barred from access to the court." Appendix, p. 66a."

Presumably, a purely interlocutory decree, not intended to be dispositive of the issue presented by the controversy or to foreclose the position of any party or potential party, is more amenable to change than a final decree. The lower court's characterization of the decree, however, seems clearly erroneous.

[15] *Cunningham* v. *English, et al.*, United States Court of Appeals for the District of Columbia Circuit, No. 15033, decided June 10, 1959, a copy of which is attached hereto at appendix, p. 63a. The question in that case was whether the consent decree was invalid under Rule 23(e), F.R. Civ. P., because of failure to give notice to the members of the plaintiff class before entry of the decree. The present petitioners there took the position that the decree was valid either because the class action, as designated in the complaint, was not within Rule 23(a)(1), or, if it was within that part of the rule, the post-entry notice which was given to the members of the class was, in the circumstances of the case, sufficient to satisfy the requirements of Rule 23(e). The Court of Appeals held that the action was within Rule 23(a)(1), but that no prior notice of the decree was required because the decree was not a compromise within the meaning of Rule 23(e). Thus, although it sustained petitioners' position that the compromise should not be undone, the Court of Appeals incidentally held that there was really no compromise to undo. This companion case is now before this Court on Cunningham's petition for certiorari, No. 383, filed September 8, 1959.

The statements of the District Court and of counsel for both sides at the time the decree was adopted show beyond question that the decree was intended as an embodiment of a compromise settling the lawsuit. Counsel for the defendants offered the proposed decree to the court as "a disposition of this case" bringing the case to "an equitable conclusion." R. 996-97. Counsel for the plaintiffs agreed with this statement and called the decree "as fine a settlement of as difficult a problem as I have ever been confronted with in my life." R. 1009-10. The District Court itself adopted the decree as "a settlement of these great issues." R. 1013.

Thus, the clearly-expressed intent of all who were concerned in the adoption of the decree precludes the conclusion reached by the court below that the decree was intended to leave the controversy open for future final disposition. If a member of the class the respondents claim to represent were to intervene in the action and were to attempt to offer evidence in support of the allegations in the complaint and to demand the relief therein prayed, it seems clear that his evidence would be rejected and his demand denied on the ground that the issues he seeks to litigate have been disposed of by compromise and that he may claim only the relief provided in the consent decree, not that demanded in the complaint. In short, he would be told that the consent decree was a settlement of the parties' rights. Petitioners submit, therefore, that, to the extent that the holding of modifiability of the decree rests on a theory that the case is still open to judgment, the holding is erroneous.

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2361-57

JOHN CUNNINGHAM, et al., PLAINTIFFS

vs.

JOHN F. ENGLISH, et al., DEFENDANTS

Memorandum Opinion

After twenty-two days of trial and when the plaintiffs had rested their case, the parties presented to the Court the consent order which is involved herein. The Court was not called upon to weigh the evidence which had been adduced.

The plaintiffs are rank and file members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association. The defendants are an unincorporated association, and the officers thereof who were elected at the 1957 convention held in the City of Miami, Florida.

The action had been brought to restrain such officers so elected from assuming the duties of their offices upon the ground that the convention had been rigged and that the election of such officers was not an expression of the membership of such International Brotherhood. As a matter of convenience throughout this Memorandum the International Brotherhood above mentioned and the individual defendants will be referred to as the Teamsters.

By the consent order the individual defendants were permitted provisionally to assume the duties of the offices to which they had been elected.

Several motions are before the Court for decision. They will be dealt with separately. Because of its overall importance, the Court will first consider the petition of the Monitors for construction, reformation and or modifica-

tion of the consent order. The power and authority of the Court to reform or modify the consent order is challenged, it being asserted by the Teamsters that the consent order must be read literally. It seems appropriate that consideration of such question should have first consideration. The law relating to this controversy is fully expounded by Justice Cardozo in *United States v. Swift & Co.*, 286 U.S. 106, wherein it is said:

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent . . . Power to modify the decree was reserved by its very terms . . . If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . . We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."

The law so stated by Justice Cardozo has to the knowledge of this Court never been disturbed, altered or in any manner changed. The conclusion is reached that a construction of the consent order requires a determination of the basic purpose for which the order was entered. Bearing in mind that the individual defendants were permitted provisionally to assume office, it is clear from a reading of the consent order, that the basic purpose of the order was to pave the way for a new convention of the International Brotherhood and for a new election of officers in accordance with the provisions of the International constitution. The consent order was entered with the tacit understanding that the evidence which had been adduced at the trial for the purpose of establishing plaintiffs' claim that the Miami convention was rigged through corrupt practices for the purpose of permitting the leaders to control the action of the convention by depriving the rank and file membership of their democratic processes in the selection of delegates to such convention tended to prove that claim

The consent order provided for the appointment of a Board of Monitors, one member to be selected by plaintiffs, one by the defendants and the third by the Court. The question arises as to what powers the Board of Monitors has. The Court is of the opinion and holds that their powers were not limited but included all proper efforts on the part of the Board to assure the rank and file membership of the International organization that a new convention would be conducted according to the provisions of the International constitution and assuring the membership that their democratic processes would not be violated. In other words, the Board of Monitors was empowered to exert every known method of achieving the basic purpose as set forth in the consent order, to wit, that a new convention would be free of corruption and in recognition of the rights of the membership.

It was tacitly understood that the evidence which had been adduced showed that officials of the International organization and of many of the Locals were corrupt and a menace to the constitutional rights of the members. It, therefore, became necessary for the Monitors to proceed to see that the International and the Locals were freed of corrupt influences by the processes of a general house cleaning. The activities of the Monitors to accomplish such purpose gave rise to many of the difficulties presented by the motions now before the Court. The consent order places this duty and responsibility upon the Board of Monitors.

It must be kept in mind that the Monitors are officers of the Court and subject to its supervision and direction to effectuate the order according to its spirit and basic purpose. The Court does not subscribe to the view that the duties and privileges of the Monitors were merely advisory.

It is true that in the early days of the monitorship the Teamsters gave substantial compliance with the orders of recommendation but it may be observed that in those early days the work of the Monitors was preparatory to

its vital purposes. The trouble arose when the Monitors proceeded to clean up the International organization and many of the Locals by seeking the dismissal of persons in position of power and authority who were known to be or suspected of being trouble makers and of a mind to control elections and conventions contrary to the constitutional rights of the members. At about this time the Monitors also set out to install by-laws in the Locals which would insure to the membership honest and uncontrolled elections. It was at this point that the Teamsters began to frustrate and block the Monitors in their efforts. In some instances they even refused to confer with the Monitors in a way which amounted to an unspoken rejection of the recommendations of the Monitors. This was in violation of their rights, knowing that if they doubted the reasonableness of such recommendations or doubted that the recommendations were pertinent to the basic purpose of the order, they had recourse to the Court. Upon such matters of disagreement, recourse has always been available to the Court for its ruling and determination of the existing controversy.

As has been indicated, the consent order is not to be construed by a literal reading of its provisions. The Monitors are officers of the Court and their powers are not limited by the grant of express powers. All other powers reasonably necessary to effect the basic purposes of the order are implied and available to the Monitors and in view of changed circumstances the inherent powers of the Court are at command to achieve the basic purposes of the order.

Such changed circumstances arose and have continued since the Teamsters ceased cooperation with the Monitors and refused or ignored the reasonable and relevant requests of the Monitors. The conduct of the Teamsters in such respect was in disregard of their obligations to afford good faith compliance with the reasonable and pertinent orders of recommendation issued by the Monitors.

Such rejection of the orders of recommendation was with full knowledge that the individual defendants were permitted provisionally to assume the duties of the offices to which they have been elected.

The language of the consent order carries the meaning that such permission to assume office is temporary and granted in view of existing known conditions and of assumed obligations. By definition and by nature a provision of this kind is subject to change.

The court has examined each of the orders of recommendation mentioned in the petition of the Monitors for construction, reformation and or modification of the consent order as amended. The Court finds that each of such orders of recommendation is reasonable and relevant to the basic purposes of the consent order. The Teamsters are obliged to comply with such orders of recommendation and in good faith cooperate with the Monitors to achieve the purposes expressed therein.

It is unnecessary to specifically comment on the several orders of recommendation which have been ignored by the Teamsters. The Court, however, will mention them by number, namely, Numbers 4, 11, 12, 14, 16, 17, 18, 19, 20 and 21. As has been stated, each of these orders of recommendation is reasonable and relevant to the basic purposes of the consent order and is deemed to be of primary importance in the work of the Monitors.

When the consent order was considered and agreed upon it was believed that necessary preparation to assure that a new convention would be organized and conducted honestly without dictation of the bosses and in full accord with democratic principles in the interest of the dues paying members would be accomplished within one year and so the consent order was written in the belief and understanding that good faith compliance would be accorded by the Teamsters. Since the Teamsters have failed in that requirement and since the Teamsters have blocked and obstructed the efforts of the Monitors to achieve the necessary clean-up in the International and the Locals,

the very essence of the consideration upon which the time element rested has been completely destroyed. The Court finds it necessary to modify and amend the consent order by deleting therefrom the privilege granted the Teamsters of calling a new convention after one year and inserting the following provision:

> "The time for the convention shall be subject to recommendation by the Board of Monitors to the General Executive Board of the International, with the exact time of holding the convention being subject to the final approval of the Court."

The foregoing modification of the consent order becomes imperative since the Teamsters have, without the knowledge and consent or approval of the Board of Monitors or of the Court, issued a call for a convention in the early part of March, 1959. Such action on the part of the Teamsters was in disregard of their obligation to make good faith effort to pave the way for the new convention by cleaning house and making preparation for the return of control to the rank and file membership through democratic processes. The Court now declares such attempt to call a new convention is null and void and the Teamsters are ordered to promptly give appropriate notice to the membership that the convention will not be held as announced in the call.

The failure of the Teamsters to cooperate and to accord good faith compliance with the orders of recommendation of the Monitors to achieve the basic purposes of the consent order has occasioned loss of valuable time. Now that the views of the Court respecting many matters in dispute are known the Court will expect prompt compliance with such orders of recommendation which have been made and such reasonable orders of recommendation as may be made by the Monitors touching the matter of housecleaning and compliance with all provisions tending to assure that the next convention will be organized and conducted honestly in such a manner as to be free of control by labor

bosses while promoting in all respects the interest of the dues paying members.

Remedies are not lacking in our judicial processes if the orders of the Court are violated, disregarded or ignored. As of now they need not be mentioned or considered.

The Second Amendment to the Petition for Construction requests the Court (a) to instruct the Monitors concerning the proper interpretation of Article X, Section 5(c) of the 1952 International Constitution; (b) to instruct the Monitors concerning the proper interpretation of the 1957 Amendment to Article X, Section 5(c) of the International Constitution dealing with the payment of one month's dues in advance by those members on check-off to insure their good standing; and (c) to determine whether or not there had been sufficient publication of the 1957 Amendment as a matter of law and whether there was a denial of due process. The Board raised these issues specifically with respect to Local 377 in Youngstown.

Under order of recommendation No. 23, regarding the eligibility of Joseph Larry Carrelly, William James Gaw and Joseph Sammartino, who were nominated for office in Local Union No. 377 of Youngstown, Ohio, the Board of Monitors ruled that there had not been proper promulgation of the 1957 Amendment to Article X, Section 5(c). The Local in Youngstown did not publish or post this Amendment on any bulletin boards and did not give notice to the members of the effective date of this Amendment. Carrelly did not receive a copy of the March issue of The International Teamster and Sammartino and Gaw did not read the notice that appeared in the March issue. These men were working under a check-off and their employer paid the dues later than the first of the month. Further, these applicants had no opportunity to pay one month's dues in advance because they did not know of the Amendment and were not given reasonable notice of when the Amendment would be put into effect. Thus, there was a

denial of due process in the application of this Amendment.

The 1957 Amendment to Article X, Section 5(c) was purportedly promulgated by being published in the March, 1958, issue of The International Teamster and that notice, a copy of which was attached to the Second Amendment as Monitors' Exhibit No. 27, stated that the Amendment was "now in effect." The 1957 Constitution became effective on January 31, 1958, with the entering of the consent order. Hence, this Amendment was effective on February 1 and March 1, 1958, and members who had not paid one month's dues in advance on those dates were disqualified. When it went into effect, members immediately became disqualified to run for office. The notice in the March issue stating that the new requirement was "now in effect" is a clear indication that it was in effect on March 4 or 5. There was no prospective effective date stated.

Inasmuch as the membership did not receive a reasonable time within which to comply with the new constitutional requirement, General President Hoffa should be ordered to republish this Amendment and put it into effect three months after its publication. Each local union should post it on its bulletin boards three times and notify all members of its publication and the effective date of the Amendment.

The Court sees another general objection to the 1957 Amendment. Under the check-off system, the employer becomes the agent of the Union and as such withholds for the benefit of the Union the dues owed by its member employees. The 1957 Amendment requires payment of one month's dues in advance by members subject to the check-off system in order to qualify as candidates for office. Members of the Union not subject to the requirements of the check-off system who are, through favor or otherwise, permitted to pay their dues directly at the office of the Local are not required to make advance payment of dues. Any such privileged member therefore has an advantage over members subject to the system. The

system affords the local labor bosses the opportunity to control the management of the Locals by limiting the number of members eligible for office. So operated the system amounts to a discrimination in favor of members permitted to make direct payment over those subject to the check-off system. It is a device by which incumbents are perpetuated in office. Because of such discrimination it is contrary to public policy and invalid.

The Monitors have questioned the legality of the merger of Locals 183 and 959 in Alaska. No direct reference may be found in the national Constitution as of 1952 nor as amended in 1957 to the subject so presented. Article XIX of both 1952 and 1957 provides, "No local union can dissolve, secede or disaffiliate while there are seven dissenting members." The official minutes of the December 12, 1957, meeting of Local 183 of Fairbanks, Alaska, indicates that twelve members voted against the consolidation of Local 183 and Local 959. The Courts and the National Labor Relations Board have set forth certain conditions which must be fulfilled. The consolidated unions must be of comparable size and must have an equal voice in deliberations; there must be an approximate equal division of officers between the unions; and the consolidation must reflect a truly democratic expression of the views of the membership. The Courts are in agreement that a vote taken on such an important issue as dissolution or merger is void where the members have not been sufficiently apprized before hand that anything so far outside the ordinary business of the union is to be presented at the meeting. This is particularly true where the meeting as in the present case on December 12, 1957, is a special and not a regular meeting. The notice given must be such that it can reasonably be concluded that in the ordinary course of events the membership generally if not entirely would have the opportunity of acquiring knowledge that the meeting was to be held and of the business to be transacted. The notice of the meeting must give its object and

where the meeting is to deal with so important a matter as dissolution or merger, it is not sufficient to state that the meeting is very important. Notice must be timely as well as specific. The official minutes of the December 12, 1957 meeting of Local 183 of Fairbanks reflect that the question of merger was never presented as a single clear-cut issue. The approval of the merger was treated as a part of or as a prerequisite to the request for the granting of autonomy and the two questions were presented for a single vote.

The record does not disclose that any sufficient and adequate notice had been given to the members that the question of merger would be considered and voted upon. The Court thinks that for this reason alone the merger so effected will be considered as void.

The Court is asked to consider and determine the applicability of Rule 23(c), Federal Rules of Civil Procedure, to the facts of the case.

The Court is presently of the opinion that the Rule is not applicable for the reason that the consent order is not a final settlement of any essential issue. The controlling issue in the case arose from the request of the plaintiffs that the individual defendants herein should not be permitted to assume the duties of the offices to which they had been elected. Such issue has not been determined. By the consent order such officers so elected were permitted to proceed upon the duties of their offices provisionally. Such permission was temporary only and subject to revocation. The Court views the consent order as procedural and within the control of the Court.

There has been presented to the Court for decision the motion of the Teamsters to disqualify and remove Godfrey P. Schmidt as a Monitor. The motion rests primarily upon the allegation that while serving as a Monitor the said Schmidt has continued to represent employers in collective bargaining negotiations with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; that Schmidt's representation of such

employers having contractural relation with the International Brotherhood presents such a direct and clear conflict of interest on his part as to disqualify him from further service as a Monitor pursuant to the Court order. The Court finds that the Teamsters have failed to exhibit such conflict of interest as alleged. Accordingly the motion seeking the removal of Schmidt as Monitor is denied.

The Court requests the *Chairman of the Board of Monitors* to present for the purposes of the Court findings of fact, conclusions of law and an order consistent with this Memorandum Opinion.

F. Dickinson Letts
Chief Judge

December 11, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14983

John F. English, et al., appellants

v.

John Cunningham, et al., appellees

Appeal from the United States District Court
for the District of Columbia

Decided June 10, 1959

Mr. Edward Bennett Williams, for appellants. *Mr. Raymond W. Bergan* also entered an appearance for appellants.

Mr. Godfrey P. Schmidt for appellees.

Mr. Martin F. O'Donoghue for Board of Monitors.

Mr. Raymond R. Dickey filed a brief on behalf of *Anthony Distinti, Robert J. Cook* and *William E. McKeever*, as *amici curiae*, urging reversal.

Before Edgerton, Wilbur K. Miller and Fahy, *Circuit Judges*.

Fahy, *Circuit Judge*: This is an appeal by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to usually as the Teamsters, and by certain of their officers, usually referred to, with the Teamsters, as defendants. The litigation was initiated by thirteen members of locals of the Teamsters, to whom we shall usually refer as plaintiffs.[1] They sued for themselves and on behalf of all other members.

The thrust of plaintiffs' original action, filed in September 1957, was that under the 1952 constitution of the Teamsters[2] plaintiffs had certain legal rights and defendants certain legal obligations, and the rights were being denied and the obligations were being repudiated by defendants. The complaint alleged, *inter alia*, a conspiracy to "rig" the election or selection of delegates to a forthcoming national convention of the Teamsters to be held in Miami in September-October 1957, numerous violations of the constitution, including the misuse of union funds, the domination and disfranchisement of members, and the imposition of officers and leaders to prevent free election, and to bring about the election of defendant James R. Hoffa as General President and of defendant Dave Beck as General President Emeritus. Other allegations includ

[1] John Cunningham, one of the thirteen, is no longer sympathetic with the positions of the other plaintiffs, but as a matter of convenience we refer to the plaintiffs as a group. The companion case of *Cunningham v. English*, decided this day, is an appeal by him alone.

[2] Unless otherwise indicated the word "constitution" refers to the constitution of the Teamsters.

charges of raids on union treasuries, refusal of financial accounting, the keeping of inadequate financial records, and the engaging by officers in private business with union funds.

The complaint prayed the court to enjoin defendants from conducting the Miami convention or the election of any national officer unless those voting were properly elected or selected in accordance with the constitution, to enjoin violation by defendants of the constitution, and to appoint "a receiver or board of receivers, a master in equity or masters in equity," who would be authorized to establish pursuant to the constitution sound procedures for elections by the members of local unions, to do these and kindred things expeditiously, and then to return the management of the affairs of the Teamsters to their General Officers duly elected "at such National Convention convened pursuant to the Order of this Court," and for other relief which need not now be specified.

The District Court, Judge Letts sitting, entered a preliminary injunction enjoining the holding of the Miami convention.[2] This court stayed the injunction,[3] deeming it to go beyond the necessities of the situation and not required to prevent irreparable injury to plaintiffs. Our stay was without prejudice, however, to such relief as might properly be grantable after the election, and we provided that "all delegates recognized or seated by the credentials committee shall be selected in accordance with the requirements of the constitution; . . ."

The convention was held, new officers were elected, and a new constitution adopted, amending the 1952 constitution. Plaintiffs then amended their complaint to attack the proceedings at the convention, seeking to stay the effectuation of any of its acts. Another preliminary injunction was issued, this time, *inter alia*, enjoining James R. Hoffa, who had been elected at the convention as Gen-

[2] Chief Justice Warren, Circuit Justice, on October 1, 1957, declined to grant relief from our stay order.

eral President of the Teamsters, and others there elected to office in the Teamsters, from taking office, from applying any decision, practice, usage or policy and expending any monies of the Teamsters' funds in violation of the 1952 constitution. This court modified but did not stay this injunction.[4]

The case then went to trial before Judge Letts. After some three weeks of trial a consent decree was entered, January 31, 1958, and the preliminary injunction last referred to was dissolved. A copy of the body of the consent decree is set forth as Appendix A to this opinion.[5]

On February 9, 1959, the consent decree was construed and modified, but without the consent of the defendants. It is from this decree, a copy of which is set forth as Appendix B to this opinion, that the instant appeal is taken.[6] We stayed this decree to enable its validity to be determined prior to the necessity of compliance.[6] Judge Miller dissented from our stay order.

1. *The Consent Decree.* We consider first the validity of the consent decree, because it is the foundation of the decree of February 9. Except as we shall specify with respect to paragraph 14 we hold the consent decree to be valid. It responds to justiciable issues which were being tried, involving the rights of members and the duties of officers of a labor organization under its constitution.

[4] That portion of the District Court's injunction which restrained the Teamsters from applying any decision, practice, usage or policy in violation of the 1952 constitution or expending Teamsters' funds in violation thereof was vacated and we substituted therefor a provision that the affairs of the Teamsters would be governed by the 1952 constitution and no amendments adopted at the convention would be put in effect during the pendency of the injunction.

[5] It is entitled Consent Order, but for convenience and uniformity with other terminology we shall refer to it as the consent decree.

[6] At the same time we expedited the hearing of the appeal

The plan consented to for the solution of the issues was within the competence of the court to approve, and neither defendants nor plaintiffs urge the contrary.[7]

In upholding the consent decree we refer particularly at this point to the creation of a Board of Monitors to assist the court and the parties in carrying out the decree.[8] This was responsive to the nature of the case and to the prayers of the complaint. As previously noted plaintiffs asked for masters in equity, but both court and parties preferred the court appointees to be called Monitors. No untoward legal significance attaches to the designation, and the court could use a board of this character to assist in bringing the litigation to a solution consistently with the rights and duties of the parties. The court thus exercised its powers to cope with a complicated situation affecting 1,500,000 union members. The latitude available to a court of equity in adapting its relief to the exigencies of a case is broad. *Virginian Ry. Co.* v. *Federation*, 300 U.S. 515, 552; and see *Green* v. *Oberafell*, 73 App. D.C. 298, 307, 121 F.2d 46, 55, *cert. denied*, 314 U.S. 637; *Alexander* v. *Hillman*, 296 U.S. 222, 239; *Union Pacific Ry. Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 163 U.S. 564, 600-01; *Ball* v. *Victor Adding Machine Co.*, 236 F.2d 170, 174-75 (5th Cir. 1956); *Bowen* v. *Hockley*, 71 F.2d 781, 786 (4th Cir. 1934); *Pomeroy's Equity Jurisprudence*, § 60, 109, 111 (5th Ed. 1941).[9] The validity of specific authority

[7] In the companion case, see note 1, *supra*, we consider separately the particular question raised by one of the original plaintiffs against the validity of the consent decree under Rule 23 Fed. R. Civ. P. The Monitors also at one stage of the litigation seem to have entertained doubts due to noncompliance with this Rule, but they do not now press them.

[8] We speak of the Monitors or the Board of Monitors as acting when often a majority did so. In some important respects Mr. Wells, the Monitor nominated by the Teamsters, did not join in their action.

conferred upon or exercised by the Monitors pursuant to the consent decree we consider later in this opinion.[9]

We refer now also to paragraph 14 of the consent decree, under which the defendants are required to pay the fees of counsel for plaintiffs and the expenses incurred in the prosecution of the action, both as determined by the District Court. There can be no question we think as to the validity of the provision with respect to expenses, including compensation to the Monitors. As to the provision with respect to fees of counsel, we deal with this in our decision of this day in the companion case of *Cunningham* v. *English*.

2. *Events intervening between the consent decree of January 31, 1958, and the decree of February 9, 1959.* The Monitors came into being as a Board on February 4, 1958, with Honorable Nathan Cayton as Chairman. Mr. Hoffa and other General Officers elected at the Miami convention took office provisionally, subject to the terms of the consent decree. In a letter to Judge Letts on May 13, 1958, Chairman Cayton stated that the Monitors had functioned well and successfully in furthering the objectives of the decree, with the "enlightened cooperation" of the International Union.[10] Judge Cayton resigned and was succeeded by Martin F. O'Donoghue, Esquire, as Chairman of the Board of Monitors. Disagreements thereafter arose. One cause may be traced to a change by the Monitors in their methods of operation, including the issuance of written "Orders of Recommendation." While many of these were complied with, the defendants disputed others on various grounds. Ensuing controversies led the Monitors on September 17, 1958, to file with the District Court a petition for the

[9] We interpolate that the Monitors are not parties to this appeal. We have, however, considered the briefs they have filed with us.

[10] Judge Cayton's letter was attached as Exhibit 1, p. 42, to the Initial Report of the Board of Monitors.

construction, reformation and or modification of the consent decree, and for other relief. They alleged that their "status and authority" had been questioned by the defendants "on the basis that the powers of the Monitors are merely advisory and recommendatory." They alleged failure of full compliance with several of their Orders of Recommendation and said the Teamsters' General Executive Board had violated the consent decree in several respects. They pointed out that the provisions of the decree regarding the holding of a new convention and election were basic objectives, to the end that de jure officers might be elected. They further alleged that notwithstanding conditions were not ripe for a new convention and election they were advised a convention was proposed for February 1959. They also alleged that Price Waterhouse & Company[11] had reported that it was essential to good auditing that better record keeping be established in the International office. The Monitors then stated that the proposed convention should be held only after modern auditing and reporting procedures had been established, to insure a truly democratic expression of the views of the membership. On September 30, 1958, Godfrey P. Schmidt, Esquire,[12] on behalf of plaintiffs filed a petition along the same general lines.

A hearing on the petitions was held by Judge Letts in November 1958. The court found bad faith on the part of defendants in not fully carrying out the consent decree, and entered the decree of February 9, 1959. The defendants dispute the findings of bad faith, claiming

[11] In April 1958, the Monitors, recognizing their need of competent professional advice with respect to review and recommendation for establishment of proper accounting and financial methods of control as provided in the consent decree, see Appendix A, paragraph 5, engaged the accounting firm of Price Waterhouse & Co. to make a preliminary survey of Teamster financial procedures and to advise the Monitors as to necessary changes.

[12] Mr. Schmidt is one of the Monitors and one of the attorneys for plaintiffs.

good faith differences of opinion about both the methods and powers of the Monitors, as well as the unsoundness of some of the Orders of Recommendation on constitutional and other grounds.

We think it unnecessary to resolve the question of bad faith or to pass upon the accuracy of the 129 findings of fact, some quite lengthy, submitted by the Monitors and adopted without change by the court. Otherwise we would be obliged to analyze and pass judgment upon each disputed charge and finding. We are able to determine the issues on appeal upon considerations other than the issue of bad faith, and aside from the accuracy of all but a few of the findings.

3. *The powers of the Monitors.* Defendants urge that the decree of February 9, 1959, invalidly transforms the powers of the Monitors from those of an advisory, consultative, and recommendatory character to those of command. Yet both the plaintiffs and the Monitors concede that the Monitors cannot command.[13] This tends to dispel whatever misunderstanding may have existed, due in part no doubt to the method by which the Monitors functioned and spoke at times. That they do not have the power to command, as they and the plaintiffs now concede, is clear from the terms of the consent decree, Appendix A. But it is equally clear that that decree imposes definite obligations upon the defendants. We summarize these obligations in Appendix C, and we also set out in summary form in Appendix D the functions of the Monitors under the terms of the consent decree. The Monitors may make recommendations to the defendants in areas where the defendants have substantive obligations under the consent decree. These recommendations may

[13] Thus, plaintiffs state to this court that the Monitors "never claimed or exercised 'mandatory' powers, at all times they knew they were possessed of only *advisory* or recommendatory powers." And the Monitors tell us in their brief that they are "only an advisory and reporting body."

be in writing if desired. Preferably they should be issued only after consultation and accompanied with efforts to obtain compliance.[14] If the Monitors are advised that defendants fail to comply in any significant respect with their obligations under the consent decree, the Monitors may so report to the court. They are required to report at least semi-annually and of course may do so oftener, for this duty is not to be construed narrowly. The court itself, after due opportunity for defendants to be heard, may issue orders within the scope of the consent decree, validly modified as hereinafter explained. We emphasize that action of the court must rest upon its decrees, not upon the Monitors' recommendations as such, and is to be embodied in an order of the court, not conveyed by reference to a separate instrument.[15]

4. *Validity of the decree of February 9, 1959.* As to this decree the principal question is whether it is valid at all. Though founded on the consent decree, it was not itself consented to. In appropriate circumstances a court may modify a consent decree without the consent of the parties. This is not contested here. The applicable principles are set forth by the Supreme Court in *United States* v. *Swift & Co.*, 286 U.S. 106, where it is said,

> The distinction is between restraints that give protection to rights fully accrued upon facts so clearly permanent as to be substantially impervious to change, and those that involve the supervision of changing

[14] Since the only valid "orders" are those of the court, the terminology "Orders of Recommendation", used by the Monitors should be abandoned. While this has more to do with method than with substance, it is obvious that the method by which the Monitors function is important.

[15] An illustration of the necessity for this, but not the only justification therefor, is that recommendations of the Monitors judging by experience, often called for action within certain time schedules impossible to meet when the court approved the recommendation.

> conduct or conditions and are thus, provisional and tentative. . . . The result is all one whether the decree has been entered after litigation or by consent . . . . In either event, a court does not abdicate its powers to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong . . . . The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

286 U.S. at 114-15. See, also, *Coca-Cola Co. v. Standard Bottling Co.*, 138 F.2d 788 (10th Cir. 1943).

Defendants read these principles to prevent modification of this consent decree. In this we think they are mistaken. As they say, the plaintiffs attacked the legality of the 1957 elections, and sought a declaration of their invalidity and the calling of new elections under judicial supervision. But it does not follow, as defendants contend, that the members' right to constitutional elections was "fully accrued," except in the very abstract sense that the right existed. The ability to attain it did not. Nor were the facts upon which the case turned "nearly permanent" and "substantially impervious to change." The consent decree clearly contemplated change which would lead toward new and valid elections. If this basic goal of the parties could not be reached in the time originally contemplated, an extension of time could validly be made by the court under the *Swift* principles. There was here "the supervision of changing conduct or conditions. . . ." 286 U.S. at 114.

It is important to remember that defendant Hoffa and other General Officers of the Teamsters have been held in office under the consent decree. Though this has been provisional, they have been permitted to be and to remain in general charge of the affairs of the Teamsters. This concession to defendants was counterbalanced in the consent decree by their acceptance of obligations to bring about a situation in which new elections of a de jure and

non-provisional character could be held, consistently with the legal rights of plaintiffs and those for whom they act. We realize the desirability of early transition from court supervision to normal organizational management, but the District Court is not required by law, or by the consent decree, to step aside until conditions advance to a point which gives reasonable assurance of new elections in accord with membership rights under the Teamsters' constitution. If defendants' obligations are not yet fulfilled we think the time for doing so may be enlarged.[18]

Thus far we hold (1) the consent degree is valid, (2) it gives the Monitors no mandatory power, (3) except as to drafting of proposed by-laws their powers are recommendatory, consultative, and advisory, but (4) they are authorized to report from time to time to the court with respect to compliance with the consent decree itself, and (5) the consent decree is not immune from modification with respect to the time for bringing about compliance with its primary obligations.

5. *Further consideration of the decree of February 9, 1959.* We consider now, insofar as necessary, other details of the decree of February 9, first those related directly to a new convention, namely, paragraphs 3, 4 and 5.

Paragraph 3. In providing that the time for the convention shall be subject to recommendation by the Board of Monitors to the General Executive Board of the Teamsters, the exact time being subject to final approval of the court, paragraph 3 subjects the court's determination of the time to the initiative of the Monitors. This much

[18] We do not need, therefore, to resolve the dispute as to whether or not the consent decree, see paragraph 8, Appendix A, left the time for the calling of the new convention to exact compliance of the Monitors. We incline to think it did not, but even if defendants, urge, new elections and a new convention were to be held at any time the defendants might choose after a year the court had power in the circumstances to extend the time.

is error. The court must retain control, though the Monitors, as well as the defendants and the plaintiffs, may recommend. The decision is that of the court, subject, as set forth in paragraph 8 of the consent decree, to the provision that in all events the convention must be called and held within the time specified in the constitution.

Paragraph 1. The District Court here ruled that the convention call for September 16, 1958, was null and void. This is now moot and is set aside for that reason.

Paragraph 3, which refers to March 15-19, 1959, is in the same category. Defendants have consented to postponement of the convention during the pendency of this appeal.

Paragraph 2. This orders defendant officers and the International to cooperate and assist the Monitors in accomplishing the basic purposes of the consent decree. We understand this portion of the paragraph is not questioned. The paragraph then provides, however, that in fulfilling this obligation,

> the Defendant provisional officers and the Defendant International shall comply promptly and fully with all future Board of Monitors' Orders of Recommendation that are reasonable and relevant to the basic purposes of the Consent Decree.

This provision, which is questioned, we set aside for the simple reason that defendants may not, by this general court order, be placed under obligation to comply with future Monitors' recommendations the terms of which are not known. Violation, if it occurs, must be in respect of specific court orders. This is basic to correct judicial administration. Rule 65 (d) Fed. R. Civ. P. provides that injunctions "shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . ." See also *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 410, as to the necessity of avoiding vagueness in court decrees. The recent decision of the

Supreme Court in *Scull* v. *Virginia*, ... U.S. ... (May 4, 1959), is illustrative of the need for definiteness in contempt cases.

In this connection and in order to clarify the relationship of the court-appointed Monitors to these proceedings, we state again how the Monitors are to function. They may make recommendations, in writing if desired, in those areas where the defendants have substantive obligations under the consent decree as validly modified. If the defendants fail to comply in any significant respect with these obligations, whether or not the subject of a recommendation, the Monitors may report this fact to the court. The court, after affording a hearing to the defendants, may order the defendants to take any necessary action within the scope of its decrees. These court orders hereafter must themselves provide what the defendants are to do, not simply refer to previous or future recommendations.[17]

Paragraphs 6 and 7. These are concerned with the eligibility of members for election to office, insofar as payment of dues is concerned under a union "check-off" system. Under Article II, section 4 of the 1952 constitution a member to be eligible for election must be in "good standing." Article X, section 5(e) of the 1952 constitution conditions membership in good standing upon a member paying dues to local unions on or before the first business day of each month. This was interpreted by defendants to require the timely receipt of the dues by the union even when checked off by the employer. The court, in conclusion of law No. 16, held the checking-off employer to be the agent of the union, thus taking the position that the employee involved would be in "good standing" even though the union was not in timely receipt of the dues, and in paragraph 6 of the February 9th decree ordered defendants so to interpret the constitution.

A 1957 amendment to Article X, section 5(e) provides

[17] See footnote 15, *supra*.

that where dues are checked off it shall be the obligation of the member to pay one month's dues in advance but thereafter he remains in good standing for each consecutive month for which the check-off is made. This amendment seems to us adequately to meet the District Court's view as to the proper interpretation of the 1952 provision, and to solve the problem.[18] *Paragraph 7* requires defendants to give the membership at least three months notice of the effective date of this 1957 amendment. A schedule of dates is set forth which, due to our stay, cannot now be met. If notice is still desired, notwithstanding our above conclusion, counsel for the parties, and the Monitors, are requested to seek agreement, failing which they may submit to the District Court their respective suggestions.

Paragraph 8. On September 29, 1958, the defendants filed a motion for the removal of Mr. Godfrey P. Schmidt as Monitor, to which Mr. Schmidt filed detailed answers, including supporting affidavits. Paragraph 8 requires defendants to cause to be read at all February 1959 local union meetings, and published in the February issue of *The International Teamster* a notice that the court has found that the defendants have presented no evidence to support their motion to disqualify and remove Mr. Schmidt as a Monitor, and that the motion was wholly without merit. The court found (Finding of Fact No. 129) that no evidence supported defendants' contentions, that seven of the eight unsworn charges against him were withdrawn, that "the remaining charge of 'conflict of interest,' although pressed by Defendants, was and is unproved on the record," and that all charges were in all respects unproved.

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[18] We add, however, that while paragraph 6 orders defendants to adopt and apply the interpretation of the 1957 amendment as set forth in conclusions of law No. 16 and No. 17, we are unable to find the court's interpretation therein, and leave this open for consideration by the District Court if any question of interpretation persists.

We accept these findings other than the one as to conflict of interest. The undisputed facts are that during the time Mr. Schmidt has been a Monitor he has represented Producers Distributors Associates, an employer, in arbitration proceedings in New York involving Teamster Local 816, including conferences with the Secretary-Treasurer of the local in New York; that a member of the office of Mr. Schmidt appeared before the National Labor Relations Board on behalf of Howard Johnson Restaurants in connection with decertification proceedings involving this same local; that he represented the Schraffts Restaurant chain in New York and in connection therewith assisted to some degree in passing upon a contract between Teamsters' Local 816 and a trucker company who is the commissary carrier for Schraffts, and had conferences on the contract with the Secretary-Treasurer of the local; that his firm represented the Coin Service Company of New Jersey in negotiations of the company looking toward a contract with Local 575, a Teamster local in New York, and also represented the Independent Sanitation Owners Group of New York in contractual negotiations with Teamsters' Local 813. There is no suggestion by us that in any of these matters, or otherwise, Mr. Schmidt has not conducted himself lawfully, in good conscience, and openly; but we believe conflict of interest exists nonetheless. His private employment in negotiating with Teamster locals on behalf of employers tends potentially and that is all that is necessary to create conflict of interest—to condition the exercise of his public responsibility as an officer of the court. Obvious, too, is the potential pressure upon Teamster locals in negotiating terms of employment with one who while representing the bargaining employer is a Monitor who possesses great influence in the affairs of the Teamsters.

Since, however, Mr. Schmidt is an officer of the District Court, we simply state our disagreement with the finding that no conflict of interest was shown. Whether the conflict of interest which was shown disqualifies him as a Monitor

is a matter to be determined initially by the appointing court in the exercise of a sound discretion on our remand of the case.

The time specified in paragraph 8 for publishing that the charges against Mr. Schmidt were unproved has long since passed. Nevertheless, if the defendants published any of the charges against him they should with equal distribution publish now that the charges were found to be unproved, except that conflict of interest was proved and that the question whether this conflict of interest disqualifies Mr. Schmidt is as yet unresolved. If counsel for the parties cannot agree as to how this publication shall be phrased or published, either or both may resort to the District Court for a decision. If, however, the defendants did not publish the charges no countervailing publication is required. Moreover, we are pointed to no evidence of publication at the local union level which requires an offsetting notice to be read to the locals.

We have not overlooked the suggestion of Mr. Schmidt that his situation is no different in essence from that of Monitor Wells. But we have no question before us as to Monitor Wells. None has been presented to the courts and no hearing had with respect to him.

Paragraph 1. This provision, which we consider last because of its nature, orders defendant provisional officers and the Teamsters to comply promptly and fully with the Board of Monitors' Orders of Recommendation No. 4, No. 11, No. 12, No. 14, No. 16, No. 17, No. 18, No. 19, No. 20, No. 21 and No. 23, and the Supplemental Orders to No. 16 and No. 19. We have been obliged to consider each of these Orders of Recommendation upon their merits, notwithstanding that their blanket approval by reference does not accord with the procedure hereafter to be followed. We pass upon their validity by determining whether or not they are within the obligations assumed in the consent decree.

Order of Recommendation No. 4. Charges had been filed with the Monitors by a rank and file committee against certain officers of Local 107 located at Philadelphia, based upon testimony adduced before the Senate Select Committee on Improper Activities in the Labor or Management Field. After discussing the matter with the General Counsel of the Teamsters the Monitors recommended that he take up with General President Hoffa the filing of charges against the local to take it under trusteeship pursuant to Article VI, section 5 of the constitution, that a panel to hear the question consist of one International vice president, one disinterested member of the International in the area, and a public member. The Order of Recommendation recites agreement that Price Waterhouse would be authorized to audit and review the books of the local and the auditing work sheets of the Senate Select Committee so as to examine for presentation to the panel the evidence that the committee had. It provided also that the International immediately notify the bonding company covering the officers of Local 107 in view of the disclosures made by the Senate Select Committee.

Price Waterhouse made an audit and filed its report with the Monitors in September 1958. This was forwarded to General President Hoffa and General Counsel Williams with the request that the charges be filed and a hearing conducted.

We are confronted in this court with a controversy between the parties as to the good faith of the defendants. They claim that full compliance with the recommendations was not possible because an injunction was obtained in a state court of Pennsylvania prohibiting the hearing by the panel. The Monitors contend the injunction would not have been obtained if defendants had proceeded in good faith to carry out the recommendations. As previously pointed out, we sustain the power of the court to modify, and, therefore, to interpret, the consent decree aside from the question of good faith.

We uphold the validity of court approval of recommendation No. 4 under paragraph 5 of the consent decree. To the extent that the substance of the recommendation has not been fulfilled defendants are obligated in good faith to do so except as they may be under order of a court of competent jurisdiction to the contrary. In that event they should make a good faith effort to obtain modification or dissolution of the injunction consistently with the rights of the parties, or, in the alternative, should institute promptly new proceedings to carry out recommendation No. 4 in a manner designed to avoid legal questions which might lead to court action to bar such proceedings.

Order of Recommendation No. 11. This involves election procedures of Local No. 245, in Springfield, Missouri. It recommends postponement of an election and a two-year audit of books and records of the local. The record indicates the recommendation has been complied with except as to the audit. The local has refused the advice of General President Hoffa to permit an audit by Price Waterhouse. We think the power of General President Hoffa under Article X, section 11 of the constitution over a trusteed local, such as No. 245, requires him to insist that the audit be conducted notwithstanding the reluctance of the local. If this power is not exercised, the problem should be presented for further consideration by the District Court.

Order of Recommendation No. 12. This recommendation recites that John J. McNamara, President of Local No. 295 in New York City, and Secretary Treasurer of Local 808, also in New York City, has been convicted of extortion. The Board recommends that he be requested by General President Hoffa to take leave of absence from these offices until his appeal has been decided and that Price Waterhouse be authorized to make a one-year audit of the books and finances of Local 808. We believe this recommendation finds basis in paragraph 5 of the consent decree which

provides for the establishment of accounting and financial methods, procedures and controls affecting funds of the Teamsters and its subordinate bodies. The General President complied with the recommendation by requesting McNamara to take leave of absence and requesting the local to permit the audit. It appears, however, that these requests have not been complied with. Without ruling generally on the use by the General President of his coercive powers under the constitution it is our opinion that in the circumstances of this particular situation, if the local's refusal has persisted, the General President should exercise his full constitutional power to bring about compliance.

Order of Recommendation No. 14. The subject of this recommendation is a report made by Price Waterhouse with respect to preliminary observations of Teamster financial records. The Monitors desired to have the defendants place the report on the agenda of a meeting of the General Executive Board, so that representatives of the auditing firm and the Monitors might discuss the report with the Board. The matter is important. It is concerned with the establishment of records of good standing of members of local unions, and with record-keeping essential to auditing and other fiscal purposes of both the Teamsters and locals. Though not complied with at the time of the hearing in the District Court, counsel for the defendants then stipulated that the recommendation would be accepted. The authority of the court to order compliance is found in paragraph 5 of the consent decree.

Order of Recommendation No. 16 and Supplemental Order No. 16. These grew out of testimony before the Senate Select Committee on August 6 and 7, 1958, on the basis of which the Monitors felt justified in recommending an investigation of Seventh Vice President Owen B. Brennan for alleged misuse of the Michigan Conference of Teamsters Welfare Fund by making weekly payments therefrom to a boxer whom Mr. Brennan was managing.

The payments were sought to be sustained, the record indicates, on the theory that the boxer was an investigator for the fund. We find authority of the court to require this matter to be investigated in paragraph 5 of the consent decree, relating to the establishment of controls affecting funds of the Teamsters and its subsidiary bodies and providing further that all persons having custody and management thereof shall be required to adhere to recognized legal standards and obligations imposed upon fiduciaries. But since Order of Recommendation No. 16 required certain action to be taken in August 1958 the date is obviously no longer applicable and was not applicable when the decree of February 9, 1959, was entered.[19] Proceedings should be instituted forthwith in accordance with the provisions of the union constitution for investigation and disciplinary action, to the extent that this has not already been done. No reason is advanced why the procedures for conducting such a hearing adopted by the Board of Monitors during Judge Cayton's chairmanship, set forth in the memorandum of Monitor Wells concerning Orders of Recommendation Nos. 16 and 17, should not be followed, with the exception that since some of the charges refer to possible association between defendant Hoffa and Mr. Brennan, independent counsel should advise the charging party, as requested by the Monitors. We find no constitutional provision to preclude this, though there is a provision requiring that only a member represent an accused member. The choice of independent counsel should be in consultation with the Monitors and need not be limited to the three persons they have recommended.

It appears that whereas this Order of Recommendation directed that Price Waterhouse audit the records of the Michigan Conference Welfare Fund for the period when

[19] This illustrates again a reason why an action required of the defendants in the future should be incorporated in an order of the court rather than by court approval of a previously issued recommendation of the Monitors.

the payments are alleged to have been made, the defendants do not have exclusive jurisdiction over such a matter and the Conference itself opposed the audit. Nevertheless, defendants should exercise their full constitutional authority to have those in charge of the fund consent to the audit. If unsuccessful, independent proceedings within the jurisdiction where the local is situated might be required.

Order of Recommendation No. 17. This Order of Recommendation is based again on testimony before the Senate Select Committee which indicates that Mr. Feldman, a business agent for Local 929 in Philadelphia, allegedly offered to settle a labor dispute between various locals and an employer for a reported $50,000. The Monitors recommended that charges should be filed against Feldman, a hearing conducted, suspension from office ordered, and that an allegation before the Senate Select Committee to the effect that Feldman was organizing an independent union of the employees of a restaurant chain be investigated. We think the subject matter of this Order of Recommendation finds support in paragraph 5 of the consent decree.

We are advised that the defendants at the time of the hearing below had begun compliance by bringing charges against Mr. Feldman, suspending him, and initiating his trial on the charges. These procedures should be concluded if this has not yet been done.

With respect to that portion of the recommendation which calls for an investigation into Mr. Feldman's activities in the organization of an independent union of the employees of the Dewey restaurant chain in Philadelphia, we think it also finds support in paragraph 5 of the consent decree and, therefore, should be complied with.

Order of Recommendation No. 18. This requires that the General President publish in *The International Teamster*, beginning with the September 1958 issue, all Orders of Recommendation beginning with No. 15, and that a 500 to 1,000 word report of the activities of the Board of

Monitors, to be prepared by them, be published in each issue. Here again the date has long since passed for initial compliance, and in any event we disapprove the requirement that Orders of Recommendation be published. The court in the exercise of a sound discretion may require publication of its own orders, and in the interest of keeping the membership advised of the progress of the case we substitute for the publication of all recommendations a requirement that the Monitors prepare in consultation with counsel for defendants a summary of previous Orders of Recommendation which have been consented to or have been approved by the District Court and by this court, together with a statement of the course of the Monitorship, which, when approved by the District Court, shall be published in *The International Teamster*.[20] If future reports of the activities of the Monitors are to be published in union periodicals, they should be the product as far as possible of consultation by the Monitors with defendants. After approval by the court if disagreement arises, the reports should be published at intervals mutually agreed, or, in the absence of agreement, as the District Court shall decide.

Order of Recommendation No. 19 and Supplemental Order No. 19. This recommendation involves alleged use of the funds of Local 515 of Chattanooga, Tennessee, by Glenn W. Smith, President of the local, to "fix" a criminal case involving officers and members of a Teamsters' local. The recommendation was in substance that the General President (1) exercise the powers conferred upon him under Article XVIII, section 10 of the constitution and file charges by August 25, 1958, for expulsion of Smith and H. L. Boling who allegedly participated in the "fix," for misappropriating union funds, violating their oath of office, engaging in conduct unbecoming a member or officer, tending to bring the union into disrepute and violating

[20] In the event the contents of such a summary cannot be agreed upon as we suggest, the District Court shall resolve the differences

sound trade union principles; (2) that the General President investigate the acquisition of the sum of $13,500 by the local from the Southern Conference of Teamsters during June 1951, and take appropriate action if investigation produces evidence of wrongdoing; (3) that he instruct Price Waterhouse to audit the books of the local covering the period involving the alleged payment from union funds to fix the criminal cases; and (4) that Smith and Boling be immediately suspended.[21]

Supplemental Order No. 19, dated August 22, 1958, recommends that the General President assume original jurisdiction over the charges against Smith and Boling by 5 p.m. that day and by that hour also notify the local. Monitor Wells protested the issuance of this recommendation at the direction of the Chairman without a meeting or conference with the other Monitors, again insisting on proper procedure.

It appears that prior to the hearing in the District Court General President Hoffa did assume original jurisdiction and order pre-trial suspension of Smith and Boling and that their trial had been held. The result does not appear. The Monitors in their brief state they have been informed that Smith and Boling were never actually suspended, but that Smith took leave of absence after being convicted by a federal court of income tax evasion, while Boling is still in charge of the local.

We approve the District Court's requirements of an audit and investigation as within its authority under paragraph 5 of the consent decree. We approve also, as authorized by the same provision, the general thrust of

[21] Monitor Wells dissented from the recommendation of immediate suspension without a hearing or opportunity to defend and to the majority's factual recitals. He stated that charges had been filed within the local union and were scheduled for prompt hearing. He also protested the failure of the majority to follow procedure required by court order "and our published procedures," urging processing of properly filed charges as provided in the constitution, without prejudgment.

the court's approval of this recommendation and supplement thereto, and we observe that in light of the statements of the Monitors in their brief, above referred to, it might be necessary for the District Court to enlist the constitutional authority of the General Officers of the Teamsters, under Article X, section 11(a) and Article XVIII, section 13(c). If these provisions are not adequate to bring a remedy to a situation where either a local or an officer of a local refuses to comply with an order of the General President, such other steps as the parties and the Monitors may suggest to the District Court as within its authority may be considered.

Again we point out, that when the court takes action on the basis of a recommendation by the Monitors, it should incorporate in its own order what is to be done and not simply approve a previously issued recommendation incorporated by reference. We point out also that the Monitors must use procedures which afford opportunity for all three Monitors to participate. Each has responsibilities as an officer of the court.

Order of Recommendation No. 20. This recommendation is dated August 19, 1958. It recommends to General President Hoffa (1) the promulgation by August 27, 1958, for adoption by all locals of "Rules for the Conduct of Local Union Nomination Meetings and Election of Officers," and (2) that by September 15, 1958, the Executive Boards of all local unions, including trusteed locals, adopt these rules in accordance with Article XXI, section 5 of the constitution. This recommendation states that it was the intention of the Monitors that these rules would remain temporarily in effect until they could recommend the adoption of model provisions for inclusion in local union by-laws. It also recommends that the General President by August 27, 1958, appoint a committee to confer with the Monitors and their staff concerning these rules and model provisions.

General President Hoffa advised the Monitors in response that he could not promulgate the attached rules because in his view some were in violation of the constitution and others were unworkable. The Monitors met with the General Executive Board September 16, 1958, and discussed the rules, after which they were redrafted and resubmitted under date of October 24, 1958.

Some elections were held in the fall of 1958 without adoption of the suggested rules and we do not understand that the Monitors now seek to cancel the results of such elections but only to sustain the charge of defendants' "bad faith" in failing to adopt the proposed rules in time to govern the elections. Since we are deciding the validity of the consent decree and its modification of February 9, 1959, including the validity of recommendations as enforced by the court, without passing upon the issue of bad faith, there seems nothing left to do about this particular recommendation insofar as past events are concerned. But there will be future elections and the consent decree imposes definite obligations on both defendants and Monitors with respect thereto. Under paragraph 4 of the consent decree the Monitors must draft a model code of local union by-laws or model provisions for inclusion therein. Undoubtedly some of these will govern election procedures which will be recommended for adoption by local unions. And paragraph 3 of the consent decree requires defendants to see that elections are conducted in a manner to afford members certain rights guaranteed by the constitution, particularly "the right to honest advertised elections" and "the right to fair and uniform qualifications to stand for office." Further discussions between the Monitors and the defendants should be had as a means of securing the adoption by the locals of rules under which these obligations can be fulfilled. As presently appears, therefore, further court action may wait a reasonable time for these discussions.

Order of Recommendation No. 21. This recommendation recites that the Monitors had made a thorough study

of information regarding a merger of Local No. 183, Fairbanks, Alaska, with Local No. 959, Anchorage, Alaska, and sets forth particulars from which it was concluded that the merger was brought about invalidly and therefore should be set aside. The recommendation is that by a specified time schedule, beginning in September 1958 and ending in January 1959, the merger should be dissolved, the locals restored to separate status, trusteeship, reinstated as to Local 183 pending local elections, a new trustee named therefor, an audit made of books and records of this local from January 1, 1957, to date (September 5, 1958), and by January 1, 1959, Local 183 be restored to self government. Monitor Wells dissented, on the grounds that the recommendations ignored the welfare of the membership in the basic matter of bargaining and management relationship, exceeded the authority of the Monitors, were based in part on alleged procedural irregularities which had not been established, and for other reasons.

While the problem presented by the court's approval of this recommendation is not without difficulty, we think we would not be warranted in declaring the approval invalid. Paragraphs 3 and 7 of the consent decree give jurisdictional basis to require a merger of locals to be made in a manner consistently with the rights of the membership which the defendants obligated themselves to protect under the construction we have given to paragraph 3, read with paragraph 7.

The defendants take the position that the Order of Recommendation was not one with which compliance could be required, and contend that the evidence established ample notice and that the merger was desired by the vast majority of members of both locals. Since, as above stated, we hold the Order of Recommendation in substance to be within the authority of the court to approve under the consent decree, an opportunity to comply with this recommendation should now be afforded with knowledge of its approval in substance by this court. Since the

time schedule fixed, however, is long since passed, and indeed had largely passed before the District Court approved the recommendation in December last, counsel for the plaintiffs and defendants, in consultation with the Monitors, should have the opportunity to agree upon a remedy for the situation, if possible, failing which a new order of the District Court may be sought by plaintiffs or Monitors.

Order of Recommendation No. 23. In this order the Monitors recommended that certain members of Local 377 of Youngstown, Ohio, be declared eligible to run for office. The members had been ruled ineligible under interpretations of the 1952 constitution and 1957 amendments thereto because their employers had failed to remit their checked-off dues on or before the first day of the month. We have already resolved the issues involving check-off and eligibility to hold office in an earlier part of this opinion, and have determined that eligibility for office shall be governed by the 1957 amendment to the constitution. It appears all that remains to be done on this point is for General President Hoffa to notify the members involved and the executive board of their local that they are eligible to run for office under the terms of the 1957 amendment.[22] We agree with the position of the Monitors that the acceptance of the dues from the employer by the local without demanding the payment of one month's dues in advance constituted a waiver of the requirement of such payment.

It will be seen from this opinion that we have not treated as a modification of the consent decree the provisions of the decree of February 9 except those relating to the convention, namely, paragraphs 3, 4, and 5. Except as moot we have on the whole sustained these as valid under

[22] Neither the parties nor the Monitors refer in their briefs or arguments in this court to that portion of the recommendation which has to do with the eligibility of Mr. Joseph Blumetti to run for office, so we assume we need not concern ourselves with this provision.

the principles of the *Swift* case. We have considered the other provisions of the February 9 decree to be in the nature of instructions or interpretations, rather than modifications. Each of those we have sustained finds its basis in the terms of the consent decree itself.[23]

We are not entering our judgment simultaneously with handing down this opinion. This variation from the usual practice is due to the nature of the case and our desire to expedite the ultimate solution of the litigation by affording an opportunity now, before entering judgment, for the parties and the Monitors to agree if possible upon a form of judgment which is consistent with our opinion, or to seek clarification before entry of judgment. See Rule 25 of the Rules of this court. This is not to say that we invite reconsideration of any matter decided, but rather agreement upon a means of carrying out the decisions reached. Accordingly the parties and the Monitors are allowed ten days for the purposes stated. However, the stay entered herein March 31, 1959, which was extended on April 17, 1959, until the further order of this court, is dissolved so as to require the carrying out of the decree of the District Court of February 9, 1959, to the extent we have not disapproved it in this opinion.

APPENDIX A

Consent Decree entered January 31, 1958

[Caption omitted]

This cause came on to be heard this term of court upon plaintiffs' demand for equitable relief as set out in the amended complaint filed herein, which amended complaint prays in the main for the calling of a new convention of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and for a new

[23] Paragraph 8 of the February 9 decree, however, regarding conflict of interest, grew out of a motion filed in the proceedings in the District Court.

election of officers in accordance with the provisions of the International's Constitution. After 22 days of trial during which oral testimony was heard and documentary evidence received, the parties hereto have consented and do hereby consent to the entry of the decree hereinafter set out.

1. It is hereby ordered that the preliminary injunction heretofore entered in this case on the 23rd day of October, 1957 be and the same is hereby dissolved and nullified, and the amended constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America adopted at the 17th convention of the International at Miami, Florida in October, 1957 shall forthwith go into effect, provisionally in accordance with the following paragraphs of this decree, and the officers of the International elected at the convention shall forthwith take office provisionally in accordance with the following paragraphs of this decree.

2. Godfrey Schmidt, nominated by the plaintiffs, L.N.D. Wells, Jr., nominated by the defendants, and Judge Nathan Cayton, nominated jointly by the plaintiffs and defendants, are hereby appointed and shall serve as a Board of Monitors for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for such period of time and with such duties as are hereinafter set out. Judge Nathan Cayton, the Monitor jointly nominated by the parties, shall serve as chairman of the Board of Monitors. A majority vote of the Monitors shall be determinative of any action to be taken by the Monitors. In the event of the inability or unwillingness to serve, or other disability on the part of any Monitor, he shall be relieved of his duties and discharged of the obligations hereunder, and a successor Monitor shall be appointed in his place by the Court upon nomination by the party or parties, as the case may be, who nominated the Monitor to whose office the successor Monitor shall be appointed. Furthermore, the Monitors are at

all times subject to removal by this Court in the exercise of its discretion for any cause and are subject as officers of the Court to supervision and direction of the Court in performing these duties as hereinafter enumerated.

3. The Board of Monitors in order to insure the enforcement and protection of all rights of the individual members and the subordinate bodies of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as guaranteed by the provisions of the International constitution, in particular,

a. the right to vote periodically for elective officers,

b. the right to honest advertised elections,

c. the right to fair and uniform qualifications to stand for office,

d. the right to freedom to express views at meetings

shall counsel with the General Executive Board of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and make recommendations upon review of appeals taken pursuant to provisions of the International constitution.

4. The Board of Monitors shall draft a model code of local union by laws not inconsistent with the International constitution, or model provisions for inclusion therein, not inconsistent with the International constitution, which model code or provisions the General Executive Board of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall recommend for adoption by the local unions.

5. The General Executive Board in consultation with the Board of Monitors shall review and where needed establish accounting and financial methods, procedures and controls affecting all funds and properties held, received and disbursed by or on behalf of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen

and Helpers of America, and its subordinate bodies. All persons having custody or management of such funds or properties shall be required to adhere to the recognized legal and equitable standards and obligations imposed upon fiduciaries in the handling of such funds and properties.

6. No officer of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall have a personal financial interest which conflicts with the full performance of his fiduciary duties as a representative of the International, nor shall he own or have a substantial business interest in any enterprise with which the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America bargains collectively, or in any business enterprise which is in competition with any other business enterprise with which his union bargains collectively, nor shall he own or have a substantial business interest in a business enterprise a substantial part of which consists of buying from, selling to, or otherwise dealing with the business enterprise with which the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America bargains collectively.

The provisions of this section do not apply in the case of an investment in the publicly traded securities of widely held corporations which investment does not constitute a substantial enough holding to affect or influence the course of corporate decision.

7. The General Executive Board of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall examine and review the status and condition of affiliated local unions under trusteeship to the end that trusteeships be removed and self government restored with all deliberate speed consistent with the best interests of the membership of such locals. The Board of Monitors shall examine and review the status and condition of locals where trusteeships are main

tained and shall counsel with and make recommendations to the General Executive Board looking toward the removal of trusteeships where removal is consistent with the best interest of the membership of the locals.

8. The Board of Monitors appointed herein shall serve as such for at least one year and thereafter until a new convention of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is held at which convention officers are duly elected and sworn; provided, however, that this Court after one year from the date of this order, in its discretion upon petition of the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or upon petition of the Board of Monitors may discharge and release said Board of Monitors, or the Court on its own motion may discharge them at any time.

A new convention and election of officers shall be held at any time after the expiration of one year from the date of this order when the General Executive Board by majority vote shall resolve to call such convention and hold such election. The Board of Monitors may recommend to the General Executive Board after the expiration of one year from the date of this order that a new convention and election be held. In all events such new convention and election of officers must be called and held within the time specified by the provisions of the constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as amended.

9. The call for a new convention and election of officers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall be issued in accordance with the International constitution by the General Executive Board.

a. Delegates to such convention shall be elected in strict and literal compliance with the International constitution.

b. The General Executive Board of the International shall recommend to its affiliated locals that such delegates be elected by secret ballot and, where practicable, under the supervision of such outside agencies as the Honest Ballot Association.

c. The examination and approval of all credentials submitted by delegates to said convention shall be made by the convention Credentials Committee and the Board of Monitors is authorized to counsel with such Credentials Committee and make recommendations to it.

10. The Board of Monitors shall receive compensation for the services performed by them in an amount to be determined by this Court, such payment to be made by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

11. The Board of Monitors shall make a report at least semi-annually to this Court and at the conclusion of its services and may make recommendations after consultation with the General Executive Board for amendments to the International constitution for proposal at the next International convention.

12. The General Executive Board of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall make available to the Board of Monitors such clerical and technical help as is reasonably required and necessary.

13. No reprisal of any sort or nature shall be taken against the plaintiffs or any witnesses or affiants in this case or any other person or persons because of their participation in or connection with this case and the General Executive Board shall press charges against anyone violating this section.

14. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America shall pay the fees of counsel for the plaintiffs and expenses in

curred by those in the prosecution of this action, such fees and expenses to be determined by this Court.

Ordered this 31st day of January, 1958.

F. Dickinson Letts
JUDGE

I consent:
Edward Bennett Williams

We consent:

Godfrey P. Schmidt
M. Joseph Blumenfeld
Thomas Dodd

APPENDIX B

February 9, 1959, decree of the court construing and modifying the Consent Decree

[Caption omitted]

Upon consideration of the Findings of Fact and Conclusions of Law made this 9th day of February, 1959, it is hereby

1. ORDERED, that the Defendant provisional officers and the Defendant International shall comply promptly and fully with the Board of Monitors' Orders of Recommendation No. 4, No. 11, No. 12, No. 14, No. 16, No. 17, No. 18, No. 19, No. 20, No. 21 and No. 23, and the Supplemental Orders to No. 16 and No. 19.

2. ORDERED, that the Defendant provisional officers and the Defendant International shall cooperate and assist the Monitors in accomplishing the basic purposes and various provisions of the Consent Decree and, in fulfilling their obligation to assist and cooperate in good faith with the Monitors, the Defendant provisional officers and the Defendant International shall comply promptly and fully with all future Board of Monitors' Orders of Recommendation that are reasonable and relevant to the basic purposes of the Consent Decree.

3. ORDERED, that Section 8 of the Consent Decree is modified and that the first two sentences of the second paragraph are deleted therefrom and the following provision is inserted in their place:

> "The time for the next convention shall be subject to recommendation by the Board of Monitors to the General Executive Board of the International Brotherhood, with the exact time of holding the convention being subject to the final approval of the Court."

4. ORDERED, that the convention call by the Defendant provisional officers and Defendant International on September 16, 1958, is null and void.

5. ORDERED, that the Defendant provisional officers and the Defendant International Union shall advise all local unions and other subordinate bodies that the call for a convention in the City of Chicago, March 15-19, 1959, is null and void. That all local unions and other subordinate bodies shall be notified that said convention shall not be held. Further, that the Defendant provisional officers and the Defendant International shall have a notice read at all February local union meetings and published in the February issue of *The International Teamster* to the effect that the authorization of a convention call has been declared null and void by the Court and that the next convention will not be held as previously announced by the Defendants.

6. ORDERED, that the Defendant provisional officers and the Defendant International shall adopt and apply the interpretations of the provisions of Article X, Section 5(c), of the 1952 International Constitution and the 1957 amendment thereto, as set forth in Conclusions of Law Nos. 16 and 17.

7. ORDERED, that the Defendant provisional officers and the Defendant International Teamsters Union shall give the membership of the International Union, at least three (3) months' notice of the effective date of the 1957

amendment to Article X, Section 5(c) and shall notify the members that the 1957 amendment will become effective on May 1st, 1959, and the Defendants shall have such notice, together with the full text of Article X, Section 5(c), and an explanation thereof, which shall be subject to approval by the Monitors (a) published in the February, March and April, 1959 issues of *The International Teamster*, (b) read at the February, March and April, 1959, local union general membership and divisional meetings, and (c) posted during the months of February, March and April, 1959, on all bulletin boards where local union notices are customarily posted.

8. ORDERED, that the Defendant provisional officer and the Defendant International shall have a notice read at all February local union meetings and published in the February issue of *The International Teamster* to the effect that the Court has found that the Defendant International has presented no evidence to support its motion to disqualify and remove Godfrey P. Schmidt, Esquire, as a Monitor, and this motion was wholly without merit.

s F. Dickinson Letts
F. Dickinson Letts,
Chief Judge, United States
District Court for the
District of Columbia

APPENDIX C

Summary of obligations imposed upon defendants by the consent decree

Para. 3. Rights of Individual Members: We construe this paragraph as requiring the Teamsters to protect the constitutional rights of individual members and locals in regard to elections, qualifications for office and freedom to express views at meetings. This conforms with the restrictive interpretation of this provision suggested by the Monitors in their brief in this court.

Para. 4. By-Laws. The Teamsters shall recommend for adoption by the locals a model code of by-laws, or model provisions for inclusion in the by-laws, to be drafted by the Monitors. (See Para. 4 of Appendix D.)

Para. 5. Fiduciary Standards. The Teamsters shall review and where needed establish accounting and financial methods for all funds and properties held, and shall require all fiduciaries of these funds to adhere to recognized legal and equitable standards and obligations imposed on fiduciaries.

Para. 6. Conflict of Interest. No Teamster officer shall have a conflicting financial interest or put himself in such a business position that will create a conflict of interest.

Para. 7. Trusteed Local Unions. The Teamsters shall examine and review the status of local unions in trusteeship to the end that the trusteed unions be returned to self-government.

Para. 8. Call of New Convention. The Teamsters shall call a new convention and election after one year from the date the consent decree is signed. (The construction of this provision is discussed in the opinion. See also Para. 8 of Appendix D.)

Para. 9. New Convention. The call for the new convention by the Teamsters must be issued in accordance with the constitution, delegates to it shall be elected according to the constitution, and the Teamsters must recommend that such delegates be elected by secret ballot and, where practicable, under the supervision of outside agencies.

Para. 10. Compensation of Monitors to be paid by Teamsters, as determined by court. (See discussion of paragraph 14, *infra.*)

Para. 12. Clerical and Technical Help to Monitors. This is required to be made available by the Teamsters.

Para. 13. Reprisals. These are prohibited.

Para. 14. Counsel Fees and Expenses. Counsel fees of plaintiffs and their expenses incurred in the prosecution of the action, determined by the court, are to be paid by the Teamsters. (See discussion of paragraph 14, *infra.*)

APPENDIX D

Summary of functions of the Monitors under the wording of the consent decree

Para. 3. Rights of Individual Members and Locals. The Monitors shall counsel and make recommendations regarding the rights of individual members and locals under the constitution with respect to elections, qualifications for office and freedom to express views at meetings.

Para. 4. By-Laws. The Monitors shall draft a model code of by-laws or model provisions for inclusion therein. (See Para. 4 of Appendix C.)

Para. 5. Fiduciary Standards. The Monitors shall recommend as to proper financial and accounting procedures and adherence to fiduciary standards of members handling union funds.

Para. 7. Trusteed Local Unions. The Monitors shall examine and review the status and condition of trusteed locals and shall counsel with and make recommendations looking toward removal of that status where consistent with the best interests of locals.

Para. 8. Call of New Convention. The Monitors may recommend when a new convention and election call may be made. (See Para. 8 of Appendix C and discussion in the opinion of the meaning of this provision.)

Para. 9. New Convention. The Monitors are authorized to counsel with and make recommendations as to credentials of delegates at new convention.

Para. 11. Reporting. The Monitors shall make a report at least semi-annually to the court and at the conclusion of their services and may make recommendations for amendment to the constitution for proposal at the next International convention.

WILBUR K. MILLER, *Circuit Judge*, concurring in part and dissenting in part: In the main, I concur in the opinion. I dissent however from the action of the majority, contained in the discussion of *Paragraph 2*, in setting aside the provision that

> "the Defendant provisional officers and the Defendant International shall comply promptly and fully with all future Board of Monitors' Orders of Recommendation that are reasonable and relevant to the basic purposes of the Consent Decree."

I do not agree that this language places the defendants "under obligation to comply with future Monitors' recommendations the terms of which are not known." It merely requires the defendants to comply with future recommendations "that are reasonable and relevant to the basic purposes of the Consent Decree." The defendants may apply to the District Court for relief from any future recommendation they consider unreasonable and irrelevant under the consent decree, and need not comply with it unless and until the District Court has ordered them to do so.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14983

JOHN F. ENGLISH, et al., APPELLANTS,

v.

JOHN CUNNINGHAM, et al., APPELLEES

Supplemental Opinion

Filed July 9, 1959

Before EDGERTON, WILBUR K. MILLER and FAHY, *Circuit Judges.*

FAHY, *Circuit Judge:* In accordance with our opinion of June 10, 1959, the plaintiffs, the defendants, and the Monitors, have agreed upon a form of proposed judgment to carry out our decisions except as herein stated.

1. In their papers first filed after our opinion of June 10, 1959, the plaintiffs and the Monitors requested that we insert a provision at the conclusion of paragraph i (c) of the proposed judgment that General President Hoffa again request John J. McNamara, President of Local 295, and Secretary-Treasurer of Local 808, to take leave of absence pending decision on his appeal from his conviction of extortion and in the event he does not promptly take said leave of absence, General President Hoffa forthwith exercise his full constitutional power to bring about compliance. Such a provision was not included in the decree of the District Court on appeal and so was not passed upon by this court in our opinion of June 10, 1959. Moreover, subsequent to our opinion Mr. McNamara's conviction for extortion was reversed by the

Appellate Division of the Supreme Court of New York. In view of this the Monitors, in their second papers filed since our opinion was rendered, have withdrawn their request.[1] We make no change in our opinion in respect of this matter.

2. Plaintiffs and a majority of the Monitors also requested in their said first papers that we insert in the judgment a provision which would direct that General President Hoffa notify the nominees involved in a local election, and the Executive Board of Local Union No. 377, that the nominees are eligible to run for office, and that he direct Local No. 377 to proceed promptly to hold the election.[2]

The United States District Court for the Northern District of Ohio has enjoined the holding of this election in a case involving these nominees and Local 377, as well as several of our defendants. On appeal, the United States Court of Appeals for the Sixth Circuit has ordered the case remanded to the District Court for determination of a jurisdictional question depending on diversity of citizenship of parties, *Gaw, et al.* v. *Higham, et al.*, ——— F.2d ———. Petition for certiorari to the Supreme Court of the United States to review the decision of the Court of

[1] The Monitors accompanied their withdrawal of the request with the following statement:

> "the Board of Monitors respectfully states to the Court that it is the Board's position that under the circumstances of the McNamara case the recommended action would have effectuated the basic purposes of the Consent Order and that there was ample constitutional authority for the General President to have required Mr. McNamara to take a leave of absence or to have suspended him."

[2] Monitor Maher opposed inclusion of this in our judgment for the reason that he finds that defendant Hoffa is under order of the United States District Court for the Northern District of Ohio, Eastern Division, directing him to take no action in this matter until further order of that court.

Appeals was denied June 29, 1959. The Monitors, in their second papers filed since our decision of June 10, 1959, advise us that in view of the order of the District Court barring an election in Local 377, "it would appear that the compliance date with this Court's Order concerning Local 377 should be postponed until after the injunction is withdrawn, dissolved or vacated." We think it would be preferable, and we so hold, that any conclusion or action by this court respecting Order of Recommendation No. 23, which covers this matter, including what we said about that Order of Recommendation in our opinion of June 10, 1959, be vacated, without prejudice to reconsideration of the matter by the District Court in light of the subsequent progress or disposition of the litigation referred to.

3. With respect to the eligibility of members in general to run for office, a matter dealt with in paragraphs 6 and 7 of the decree of the District Court of February 9, 1959, it is our opinion that members were not given adequate notice of the coming into effect of the 1957 amendment to Article X, Section 5(c) of the constitution of the Teamsters so as to enable those who desired to comply with its provisions to do so. Although the District Court stated that the 1957 amendment became effective by the entering of the consent decree on January 31, 1958, the language of the court as a whole clearly shows that the amendment was not actually to become effective in operation without proper promulgation and notice to the members. It is our view that no member shall be declared ineligible for office for failure of compliance with this amendment until notice of the effectiveness of the amendment shall have been given to the membership generally in a manner to be agreed by the Monitors and counsel for the parties, or, in the absence of such agreement, as is required by the District Court.

The situation thus existing leaves in effect, governing the eligibility of some members, the provisions of Article X, Section 5(c), of the 1952 constitution. It is therefore

incumbent upon us to interpret that provision. It is our view that, as the District Court held, where an employer under an agreement with a local union checked off dues of an employee member, the employer was the agent of the union and consequently the member should not be considered delinquent if the employer, through no fault of the member, delayed paying the dues to the union on time, that is, on or before the first day of the month.

Our opinion of June 10, 1959, is amplified and modified as herein set forth.

Our judgment this day entered is substantially in the form agreed upon by the parties and the Monitors, with additional provisions by us to conform the judgment with what we have said in this Supplemental Opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,983

September Term, 1958

JOHN F. ENGLISH, et al., APPELLANTS,

v.

JOHN CUNNINGHAM, et al., APPELLEES.

United States Court of Appeals
For the
District of Columbia
FILED JUL 9 1959
JOSEPH W. STEWART

Appeal from the United States District Court for the District of Columbia.

Before: EDGERTON, WILBUR K. MILLER, and FAHY, *Circuit Judges*.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this court that Paragraph 1 of the decree of the District Court of February 9, 1959, is modified as of the date of this judgment as follows:

1. (a) ORDERED that the defendants within thirty days after the entry of this judgment make good faith efforts to obtain modification or dissolution of the September 22, 1958 injunction of the Court of Common Pleas of the City of Philadelphia, consistently with the rights of the parties, or, in the alternative, institute such new proceedings as may be agreed upon by parties and The Monitors and approved by the District Court or as may be directed by the District Court, or institute trusteeship proceedings, by (a) filing written charges against Local Union No. 107 to place it under trusteeship in accordance with the provisions of Article VI, Section 5 of the International Constitution and (b) appointing a panel consisting of one International Vice President, one disinterested member of the International Brotherhood from the area involved and a public member with experience and stature in the labor relations field; and, it is

(b) FURTHER ORDERED that in accordance with the provisions of Article X, Section 11 and Article VI, Section 5 of the International Constitution, General President Hoffa within ten days after the date of this judgment direct the trustee and the officers of trusteed

Local Union No. 245 to permit Price Waterhouse & Co. to conduct an audit of the books of the Local for the period from June, 1956 to date; and, it is

(c) FURTHER ORDERED that in accordance with the provisions of Article X, Section 11 of the International Constitution, General President Hoffa within ten days after the date of this judgment direct the officers of Local Union No. 808 to permit Price Waterhouse & Co. to conduct an audit of the books of the Local for the period from July, 1957 to date; and, it is

(d) FURTHER ORDERED that the defendants make a thorough study of the Price Waterhouse report, dated July 22, 1958, and place it on the agenda of the next regular meeting of the General Executive Board so that the Monitors and representatives of Price Waterhouse & Co. may discuss the contents of the report with the General Executive Board at said meeting; and, it is

(e) FURTHER ORDERED that the General Secretary-Treasurer English and or First Vice President Conlin (a) within fifteen days after the date of this judgment in consultation with the Monitors employ an outside attorney to serve as special counsel in advising the charging party with respect to the preparing and processing of charges and the conduct of the hearing on charges against Seventh Vice President Brennan, (b) within five days after the employment of special outside counsel arrange for a thorough investigation of the charges against Vice President Brennan, (c) within ten days after the conclusion of the investigation file such charges as are warranted by the evidence with the General Executive Board against Vice President Brennan in accordance with the provisions of Article XVIII, Section 3(d) of the International Constitution, (d) within five days after the date of the filing of charges notify the Executive

Board of Local Union 337, Detroit, Michigan, of the charges made against Vice President Brennan and the action being taken by the International Union and recommend that consideration be given to instituting proceedings to remove Mr. Brennan from his office as president of the Local, and (c) within ten days after the employment of special outside counsel exercise their full constitutional authority to have those in charge of the Michigan Conference Welfare Fund consent to a Price Waterhouse & Co. audit of the records of the Fund for the period during which payments were made to Mr. Davidson and, if consent is not given, the defendants shall exercise their full constitutional authority to secure compliance; further ordered that General President Hoffa forthwith disqualify himself from any participation, direct or indirect, in the filing and investigation of the charges against Vice President Brennan and, in the conduct of the hearings concerning them; and that the defendants arrange to have a hearing conducted not later than the next regular General Executive Board meeting after the filing of charges in accordance with the procedures set forth on pages 50-51 of the *Initial Report of Board of Monitors*, namely:

(1) Copies of all charges should be submitted in writing to the person charged at least ten days prior to any trial or hearing.

(2) When a person charged requests specification of general charges, such specification should be promptly supplied. Details of the conduct or activity should be described, giving dates and places where possible.

(3) The trial board should not include among its members any person who is in the role of an accuser. (See Constitution, Article XVIII, Sec. 1 (a).)

(4) Either verbatim minutes of the hearing or accurate summaries of the evidence should be kept.

Upon request, these should be made available to the accused.

(5) The accused should be given a reasonable opportunity, in connection with an appeal, to offer corrections of the stenographic minutes mentioned in Item (4) above if he deems correction necessary; and his offer of correction should constitute part of the minutes of the proceeding.

(6) The accused should have the right to confront and cross examine witnesses giving testimony against him.

(7) The trial board should give to the accused full opportunity to make his defense and to produce testimonial or documentary evidence for that purpose.

(8) The decision of trial boards should recite the facts which it finds to be true and should also set forth the basis for the decision reached.

(9) All documents in the proceeding, as well as summaries of evidence or stenographic minutes, shall be preserved and kept available for use in further proceedings in the Union.

(10) It should always be understood that every accusation must be supported by proof;

and, it is

(f) FURTHER ORDERED that the defendants continue the suspension of Mr. Feldman; that within thirty days after the date of this judgment the defendants conclude the investigation of the allegations made at the hearing of the Senate Select Committee on August 8, 1958, regarding Mr. Feldman's activities in the organization of an independent union of the employees of the Dewey Restaurant Chain in Philadelphia; that within twenty days after the conclusion of the investigation the defendants submit to the Board of Monitors a report on said investigation; that the defendants, within thirty days after the date of providing the Monitors with a copy of the report, conclude the

hearing on the charges filed by the General President against Samuel Feldman for expulsion from membership under the provisions of Article XVIII, Section 10 and Section 13(e) of the International Constitution; and, it is

(g) FURTHER ORDERED that the Board of Monitors, in consultation with counsel for the defendants, prepare a summary of previous Recommendations to which consent has been given; or which have been approved by the District Court or the Court of Appeals, together with a statement of the course of the Monitorship which, when approved by the District Court shall be published in *The International Teamster*; and it is

(h) FURTHER ORDERED that the defendants (a) forthwith suspend or continue the suspension of Glenn W. Smith and H. L. Boling from office; (b) within twenty days after the date of this judgment conduct a thorough investigation into the acquisition of the sum of $13,500 by Local 515 from the Southern Conference of Teamsters during June, 1951, and, if the investigation produces evidence of wrongdoing on the part of any officer of officers of the Southern Conference, file appropriate charges; (c) within five days after the date of this judgment instruct Price Waterhouse & Co. to audit the books and records of Local 515 for the period during which the checks were issued in payment of the $20,000 alleged "fix"; and (d) within twenty days after the audit has been completed conclude the hearing on charges filed for expulsion from membership against Glenn W. Smith and H. L. Boling as officers and members of Teamster Local 515; and, it is

(i) FURTHER ORDERED that the defendants within a reasonable time discuss with the Monitors means of securing the adoption by all Local Unions of temporary

ary rules governing the conduct of nomination meetings and elections of Local Union officers and the adoption of a Model Code of Local Union By-laws in accordance with the obligations of the defendants under paragraphs 3 and 4 of the Consent Decree; and, it is

2. FURTHER ORDERED AND ADJUDGED by this court that the substance of the District Court's decree of February 9, 1959, with respect to the merger of Local Union No. 183 with Local Union No. 959 is approved; and further ordered that since the time schedule fixed for compliance is long since passed, counsel for plaintiffs and defendants, in consultation with the Monitors, shall attempt to agree upon a remedy for the situation, if possible; failing which, a new order of the District Court may be sought by the plaintiffs or the Monitors; and,

3. IT IS FURTHER ORDERED AND ADJUDGED by this court that paragraph 2 of the decree of February 9, 1959, is modified to read as follows:

> ORDERED, that the Defendant provisional officers and the Defendant International shall cooperate and assist the Monitors in accomplishing the basic purposes and various provisions of the Consent Decree;

and

4. IT IS FURTHER ORDERED AND ADJUDGED by this court that paragraph 3 of the District Court's decree of February 9, 1959, is modified by providing that Section 8 of the Consent Decree is modified by deleting the first two sentences of the second paragraph of Section 8 and by inserting the following provisions in their place:

> A new convention and election of officers shall be held at any time after the expiration of one year from the date of this order when the District Court shall determine that such convention and election be called and held. The plaintiffs, the defendants and

the Monitors may make recommendations to the District Court as to the time when the next convention and election should be held;

and,

5. IT IS FURTHER ORDERED AND ADJUDGED by this court that paragraph 4 of the District Court's decree of February 9, 1959, is vacated and set aside as moot; and,

6. IT IS FURTHER ORDERED AND ADJUDGED by this court that paragraph 5 of the District Court's decree of February 9, 1959, is vacated and set aside as moot; and,

7. IT IS FURTHER ORDERED AND ADJUDGED by this court that the conclusion of the District Court that Mr. Godfrey P. Schmidt, as a member of the Board of Monitors, is not involved in a conflict of interest is overruled and the District Court is instructed to determine, in the exercise of a sound discretion, on the remand of the cause hereinafter ordered and in the light of our opinion of June 10, 1959, whether the conflict of interest which was shown disqualifies Mr. Schmidt as a Monitor; and,

8. IT IS FURTHER ORDERED AND ADJUDGED by this court that paragraph 8 of the District Court's decree of February 9, 1959, is modified to read as follows:

The defendants shall cause to be published in *The International Teamster* the following statement:

"Referring to the various charges against Mr. Godfrey P. Schmidt appearing at page 8 of the October 1958 issue of The International Teamster, the District Court found all of them unproved. The Court of Appeals said: 'We accept these findings other than the one as to conflict of interest. The undisputed facts are that during the time Mr. Schmidt has been a Monitor he has represented Producers Distributors Associates, an employer, in arbitration proceedings in New York involving

Teamster Local 816, including conferences with the Secretary-Treasurer of the local in New York; that a member of the office of Mr. Schmidt appeared before the National Labor Relations Board on behalf of Howard Johnson Restaurants in connection with decertification proceedings involving the same local; that he represented the Schrafft's Restaurant chain in New York and in connection therewith assisted to some degree in passing upon a contract between Teamsters' Local 816 and a trucker company who is the commissary carrier for Schrafft's, and had conferences on the contract with the Secretary-Treasurer of the local; that his firm represented the Coin Service Company of New Jersey in negotiations of the company looking toward a contract with Local 575, a Teamster local in New York, and also represented the Independent Sanitation Owners Group of New York in contractual negotiations with Teamsters' Local 813. There is no suggestion by us that in any of these matters, or otherwise, Mr. Schmidt has not conducted himself lawfully, in good conscience, and openly; but we believe conflict of interest exists nonetheless. His private employment in negotiating with Teamster locals on behalf of employers tends potentially—and that is all that is necessary to create conflict of interest—to condition the exercise of his public responsibility as an officer of the court. Obvious, too, is the potential pressure upon Teamster locals in negotiating terms of employment with one who while representing the bargaining employer is a Monitor who possesses great influence in the affairs of the Teamsters.

Since, however, Mr. Schmidt is an officer of the District Court, we simply state our disagreement with the finding that no conflict of interest was shown. Whether the conflict of interest which was shown disqualifies him as a Monitor is a matter to be determined initially by the appointing court in the exercise of a sound discretion on our remand of the case.'"

9. IT IS FURTHER ORDERED AND ADJUDGED by this court that the provisions of the decree of February 9, 1959, that the defendants shall comply with Order of Recom-

mendation No. 23, and the conclusion of our opinion of June 10, 1959, respecting that matter, are vacated, without prejudice to further consideration of the subject matter in the District Court in light of the progress or disposition of the litigation referred to as *Gaw, et al.* v. *Higham, et al.*, pending in the United States District Court for the Northern District of Ohio.

10. It is FURTHER ORDERED AND ADJUDGED by this court that paragraph 6 of the decree of February 9, 1959, to the extent that it orders defendants to apply the interpretation of Article X, Section 5(c) of the 1952 constitution as set forth in Conclusion of Law No. 16, is hereby affirmed, and that paragraph 7 of the said decree of February 9, 1959, and the conclusions of this court set forth in our opinion of June 10, 1959, respecting the 1957 amendment to Article X, Section 5(c) of the constitution, be modified conformably with the Supplemental Opinion of this court rendered this day.

11. It is FURTHER ORDERED by this court that in all other respects the decree of the District Court entered February 9, 1959, is affirmed and that this cause is remanded to the District Court for further proceedings in conformity with the opinions and judgment of this court.

PER CURIAM

Dated: July 9, 1959

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15033

JOHN CUNNINGHAM, APPELLANT

v.

JOHN F. ENGLISH, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

---

Decided June 10, 1959

Messrs. Raymond R. Dickey and *Joseph M. Williamson*, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, for appellant. *Mr. Robert Rolnick* also entered an appearance for appellant.

Mr. Edward Bennett Williams for appellees. *Mr. Raymond W. Bergan* also entered an appearance for appellees.

Mr. Thomas X. Dunn for Board of Monitors. *Mr. Martin F. O'Donoghue* was on the brief for Board of Monitors.

Before EDGERTON, WILBUR K. MILLER and FAHY, *Circuit Judges*.

FAHY, *Circuit Judge*: In this appeal, John Cunningham, one of the plaintiffs in the companion case of *English* v. *Cunningham*, decided this day, attacks the decree of February 9, 1959, primarily on the ground that the consent decree of January 31, 1958, upon which the later decree rests, is void. The contention is that the District Court did not have jurisdiction to approve the consent decree without first giving notice to all persons who were to be bound. This result is said to be required by Rule 23 of the

Fed. R. Civ. P. A contention is also made that failure to give notice led to a denial of due process.

Rule 23, in pertinent part set forth in the margin,[1] provides that "A class action shall not be dismissed or compromised without approval of the court," and that when the right sought to be enforced for the class is joint or common "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

It seems clear enough that the rights sought to be enforced by the plaintiffs in the companion case are joint or common with the rights of members of the Teamsters and its subsidiary bodies, see *Underwood* v. *Maloney*, 14 F.R.D. 22, (D. Pa. 1953), thus classifying the rights as

[1] Rule 23:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it."

within section (a) (1) of the Rule. Furthermore, notice of the proposed consent decree was not given to all members of the class until after it had been entered. We agree with District Judge Letts, however, that notice was not required under the Rule since the decree was not a dismissal or compromise of the action within the meaning of section 3(c) of the Rule. That the consent decree was not a dismissal goes without saying. And we think it not such a compromise as required advance notice. The Rule applies only to a final disposition of an action, either by dismissal or by compromise. It does not apply even to a final disposition by adjudication.

As Judge Letts said, the consent decree "is not a final settlement of the essential issue but is interlocutory in nature." It embodied a plan, and terms for carrying it out, which required a large measure of future conduct by the parties, leading toward an ultimate disposition of the litigation by the court itself.

The rule makers had in mind something quite different, primarily stockholders' derivative actions, where a stockholder-plaintiff might "sell out" other stockholders by disposing of the action by dismissal or compromise. See notes of the Advisory Committee on the Rules where reference is had to *McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421 (1937). As the author states at 430:

> To allow a single stockholder or group of stockholders the power to make a private compromise of the corporate cause of action places a heavy reliance upon their judgment (assuming its exercise in good faith), and leaves the corporate claim (and the indirect rights of non-joining stockholders) at the mercy of individuals who have no hope of personal recovery even if the suit is prosecuted successfully . . . [O]bviously a wide door is opened to strike suits and collusive payments to stockholders which may rarely, if ever, be recovered by the corporation.

See, also, *Winkelman v. General Motors Corp.*, 39 F. Supp. 826, 831 (S.D.N.Y. 1940); *Craftsman Finance & Mortgage Co. v. Brown*, 64 F. Supp. 168, 178 (S.D.N.Y. 1945); 3 *Moore, Federal Practice*, par. 23.24, at 3549 (2d ed. 1948); 2 *Barron and Holtzoff, Federal Practice and Procedure* § 570, at 185 (Rules ed. 1950).

While the Rule must be given a fair application consistent with its language even if its framers had in mind something more limited, it is not to be given an application inconsistent with its purpose. No one has been closed out of the present litigation by a dismissal or compromise. The litigation continues. No member of the class has been barred from access to the court.

Paragraph 14 of the consent decree obligates the Teamsters to pay the fees of counsel for plaintiffs, the amount being subject to the approval of the District Court. We think this provision is severable from the remainder of the consent decree. Notice should have been given to the membership before approval by a court of equity of this obligation upon union funds, even if not required by Rule 23.[2] The amount of fees approved by the District Court is in dispute in litigation pending in this court, No. 14733, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Thomas J. Dodd, et al.* The fees accordingly have not been paid. The solution, therefore, is to suspend this provision of paragraph 14 of the consent decree and to direct the District Court to (1) give notice with respect to it and (2) reconsider the provision in the light of the result of the notice.

The claim of violation of due process by reason of the absence of notice must also be denied for the same reasons which preclude the necessity of notice under the Rule.

[2] Out of pocket expenses of litigation, and the compensation of the Monitors, which the Teamsters must also pay, we think are not in the same category as counsel fees.

The remaining contentions of appellant need not be discussed except as they are considered in the companion case of *English* v. *Cunningham*.

Affirmed except as the decree on appeal is modified in the companion case decided this day.

WILBUR K. MILLER, *Circuit Judge*, concurring in part and dissenting in part: I dissent from the paragraph of the majority opinion which deals with Paragraph 14 of the consent decree. That Paragraph obligates the Teamsters to pay the plaintiffs' counsel fees, the amount being subject to the approval of the District Court. The amount allowed is now on appeal to us in case No. 14,733 and, I think, should be disposed of there.

Although conceding that the giving of notice concerning Paragraph 14 to the membership of the Teamsters union is not "strictly required" by Rule 23, the majority say notice should nevertheless be given. They suspend this provision of Paragraph 14 "to await the outcome of the notice." I see no reason to require that notice be given, or to suspend the provision.

Otherwise I concur in Judge Fahy's opinion.

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FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

[redacted]

APPLICATION FOR STAY

[redacted]

Harold Leventhal
Raymond W. Bergan
1000 Hill Building
Washington 6, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

JOHN F. ENGLISH, Individually and as General Secretary-Treasurer of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, DAVE BECK, DANIEL J. MURPHY, JOHN F. CONLIN, SIDNEY L. BRENNAN, JOHN T. O'BRIEN, FRANK BREWSTER, WILLIAM A. LEE, JOSEPH DIVINY, JAMES R. HOFFA, EINAR MOHN, HARRY TEVIS, HAROLD J. GIBBONS, GORDON R. CONKLIN, GEORGE R. MOCK, JOHN J. O'ROURKE, THOMAS E. FLYNN, OWEN BRENNAN, JOHN J. BACKHUS, MURRAY W. MILLER and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners*

v.

JOHN CUNNINGHAM, THOMAS G. MANNING, FRANK KENNEDY, ANDREW BOGGIA, GEORGE BECKER, JOSEPH MOLLOY, JOHN MCMANUS, HAROLD WILL, STEVE MILONE, JOHN MCGLYNN, EDWARD MCFARLAND, JOHN OLSEN and HOBART GALE, *Respondents*

APPLICATION FOR STAY

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners, having this day filed in this Court a petition for a writ of certiorari to review the judgment of the Court of Appeals entered in this cause on July 9, 1959, hereby pray that, in the event this Court grants the petition, the said judgment be stayed pending this Court's final determination of the cause.

I. Nature of the Case

The nature of the case is fully described in the petition for certiorari filed this day.

II. Jurisdiction

The jurisdiction of the Supreme Court to review this case on petition for certiorari rests upon 28 U.S.C. § 1254(1). Jurisdiction to issue the stay herein requested is granted by 28 U.S.C. § 2101(f). An application for a stay was made to the court below and was denied on July 15, 1959. Thereafter, on July 20, 1959, pending preparation of the petition for certiorari, petitioners applied to Mr. Justice Frankfurter for a stay, which application he denied on August 4, 1959.

III. The Ruling Below and the Reasons for Certiorari

The ruling below is set forth in the petition for certiorari filed this day and the reasons for certiorari are therein fully stated.

IV. Reasons for Granting a Stay

Mr. Justice Frankfurter stated in his opinion of August 4, 1959, denying petitioners' earlier application for a stay:

> "If it were clear that between now and October 12, which is the earliest day for the disposition of the proposed petition for certiorari, what the Court of Appeals has directed to be done could be capable of being carried out so as to change, irrevocably and adversely, the rights and powers claimed by the defendants, before this Court had an opportunity to determine the validity of what the defendants have been ordered to do, I would feel constrained to grant the stay. It may well be that the Court of Appeals, after due considera-

> tion, on July 15, 1959, denied this stay on its forecast that its decree could not, in view of all the circumstances, be effectuated before this Court could pass on a petition for certiorari, with the ancillary question of a stay in case such petition were granted."

Mr. Justice Frankfurter then concluded that there was no likelihood that, prior to October 12, 1959, petitioners would suffer irreparable injury through enforcement of the judgment.

Petitioners respectfully submit that the prospects of irreparable injury through enforcement of the judgment which they set forth in their application to Mr. Justice Frankfurter and which he concluded could could not be realized by October 12, 1959, are very likely to be realized before this Court finally determines the cause.

For example, by paragraph 2 of its judgment, the court below approved the District Court's order requiring dissolution of the merger of Locals 183 and 959, but, since the time specified for compliance had passed, ordered that the parties seek agreement upon a remedy for the situation, failing which a new order could be sought from the District Court. As clear as it may have been that this portion of the judgment below could not be effectuated by October 12, 1959, it is equally clear that it will be effectuated, unless stayed, before this Court can finally decide the case. It is also clear that, if the judgment is effectuated and is thereafter reversed by this Court, there will have been a serious and irreparable injury to the members of the two locals in question as well as to the International as a whole. The merger was consummated in January, 1958, and, since then, all of the business and financial

affairs of the two locals, as well as their collective bargaining activities and their contract-making functions, have been centered in Local 959. The disruption of this centralized operation would necessarily entail serious administrative difficulties and would be likely to create problems for both locals under contracts which the merged organization has made with employers. Moreover, since the overwhelming majority of the members of both locals are in favor of the merger, notwithstanding the Monitors' belief that, for technical reasons, they ought not to be, a dissolution ordered from above is likely to be received as a blow against autonomy which could lead to dissension between those locals and the I.B.T.

Under the judgment now sought to be reviewed, as more fully appears from the petition for certiorari as well as from the judgment itself, a copy of which is included in the appendix to the petition, the court below takes away from the 1,600,000 members of the International Brotherhood of Teamsters and its subordinate bodies the right to govern their own affairs through their elected International and local executives and it subjects them to the day-to-day government of the District Court. The right to interpret and apply the International constitution, the fundamental law of the union, is taken from the officers who constitutionally hold it and is conferred on the District Court. Internal disciplinary proceedings are to be conducted under regulations and procedures established by the District Court, in disregard of those prescribed in the constitution. The District Court determines such policy matters as mergers and dissolution of mergers of locals. The District Court, moreover, through the Board of Monitors, is author-

ized to conduct a virtually unlimited investigation into broad areas of the affairs of the International and its constituent locals for the purpose of discovering conditions to be changed by judicial order.

The financial cost to the International of the Monitors' activities amounts thus far to over $250,000. There must be added to this figure the International's own large, but undeterminable costs for legal and administrative services involved in dealing with the Monitors. Future costs, moreover, will include the fees to be paid, at rates up to $35 per man-hour, to the firm of attorneys which the District Court, by order of July 23, 1959, has authorized the Monitors to employ to represent them in anticipated litigation and to serve such other "purposes as may be reasonable and necessary in conduct of" the Monitors' duties.

It is submitted that this ever increasing drain upon the funds of the members of the International is reason enough to grant a stay. Petitioners recognize, as Mr. Justice Frankfurter pointed out, that the Court of Appeals may be relied upon to prevent the allowance of exorbitant fees. They submit, however, that, in view of the Monitors' free ranging activities, future fees and costs, even if not charged at exorbitant rates, can easily mount to huge proportions and ought not to be incurred for activities which may eventually be held to have been unauthorized. A stay would prevent the accrual of unnecessary obligations and would save either the International or the Monitors and their counsel from unrecoverable financial damage.

Shortly after Mr. Justice Frankfurter's denial of petitioners' application for a stay, the Monitors announced their intention to interfere in the internal

affairs of the International and its locals even beyond the extent of their previous interference. At a formal meeting on August 11, 1959, between the Monitors and their counsel, on the one hand, and the General President of the International and petitioners' counsel, on the other, the chairman of the Board of Monitors announced, on behalf of a majority of the Board, that he intended to compel a series of intra-union disciplinary proceedings looking toward the removal from office of a number of International and local officers, in some cases even before hearing on charges, and that, if the petitioners would not cooperate in such plan, the Monitors would seek a District Court order to compel their cooperation. At the same meeting, the chairman also announced the desire of the majority of the Board of Monitors that the petitioners compel all of the almost 1000 locals to adopt the code of election rules drafted by the Monitors and stated that, if petitioners refused to force such adoption, the District Court would be asked to compel them. On August 13, 1959, the Monitors made a formal request on the District Court for authority to examine the officers and members of a local under subpoena power. On September 2, 1959, the Monitors began to carry out the plans they had announced at the August 11 meeting. They formally recommended the immediate suspension by the General President of the International of the presidents of three local unions from both office and union membership, the filing of charges and the holding of hearings thereon to follow such suspension.[1] They further recommended, with respect to one of those locals,

[1] On September 11, 1959, the Monitors withdrew so much of the recommendation as would require immediate suspension from membership. The next day, they stated that they reserve the right, under certain conditions, to withdraw so much of the recommendation as would require pre-hearing suspension from office.

that it be placed under trusteeship and, with respect to another, which has been receiving financial aid from the International, that such aid be immediately cut off. These recommendations were also formally reported to the District Court.[2]

In view of these expanded activities by the Monitors, involving so sweeping a degree of interference with the members' right to control their own affairs, petitioners have reason to anticipate in various locals a wave of resentment and dissension leading, in some cases, to disruption of the International. The International is a contractual confederation of local unions in the United States and Canada which have bound themselves to the government of a written constitution and not to the dictates of a federal court in an action to which they are not parties. The court below held that the International has bound itself by the consent decree to compel local unions to adopt election rules or by-laws drafted by the Monitors, even where such rules or by-laws exceed the constitution, and to employ extra-constitutional procedures in intra-union proceedings; has submitted itself and its constituent locals to such interference by the Monitors as is now contemplated; and has substituted for constitutional government the controlling hand of a federal judge. The various locals, not being parties to the suit and, therefore, not bound by the judgment, may treat the International's acceptance of such a consent decree as a breach of the contract of confederation justifying secession. Whether a local's right to secede for the stated reason would ultimately be upheld would have to be determined by collateral litigation. Whatever the outcome, however, the disruption of administration,

[2] The communications of September 11 and 12, 1959, see *supra* note 1, do not appear to have been transmitted to the District Court.

the creation of difficulties under regional contracts and the impairment of the stability of collective bargaining relationships would produce irreparable damage, unjustified by any asserted need for speedy execution of the judgment.

Petitioners cannot say, of course, that the Monitors' attempts to interfere in the union's internal affairs to the full extent described above will be effectuated before final decision of the case by this Court. It is fair to say, however, that some of the Monitors' attempts are very likely to be effectuated before decision if there is no stay of the judgment. In any event, to prevent effectuation of the various interferences projected by the Monitors, petitioners will be required, in each case, to engage in legal proceedings. Since the date of the denial of their earlier stay application by Mr. Justice Frankfurter, for example, petitioners have already unsuccessfully sought a District Court stay of the order of July 23, 1959, authorizing the Monitors to employ counsel and they have appealed from that order to the Court of Appeals and there moved for a stay. They have also filed an opposition to the Monitors' request for subpoena powers. They will probably shortly be in court with the Monitors on account of the latter's attempt to force their election rules upon the locals. Thus, even if, by dint of a multiplicity of legal proceedings, the petitioners may possibly succeed in staving off for a time some or all of the Monitors' newly devised interferences, it is submitted that, pending this Court's final determination of the cause, they should not be subjected to that necessity.

Finally, it may be observed that, to the extent that the judgment below deprives the 1,600,000 members of the International of their constitutional right to

manage their own affairs, including the right to have had, by this time, a new convention duly called by their General Executive Board, this Court, by reversing that judgment, can only restore to them their right of self-government, but cannot make them whole for its temporary invasion. Equity suggests, therefore, that the invasion be kept to a minimum by a stay of execution of the judgment under review. So far as the new convention is concerned, petitioners, though unable to understand respondents' claim that they would be injured by such a convention, will undertake, as they did also in seeking a stay below, that they will not call a convention pending final determination of the cause.

WHEREFORE, petitioners pray that this Court, in the event it grants their petition for certiorari, issue a stay of execution of the judgment below pending its final determination of the cause.

Respectfully submitted,

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MOTION OF ANTHONY J. DISTINTI, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 277, I.B.T.; ROBERT J. COAR, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 701, I.B.T.; AND WILLIAM J. McKERNAN, INDIVIDUALLY AND AS SECRETARY-TREASURER OF LOCAL 617, I.B.T., FOR LEAVE TO FILE BRIEF AMICI CURIAE, AND BRIEF

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The above named movants, pursuant to Rule 42 of the Rules of this Court, respectfully move for leave to file the brief *amici curiae* annexed hereto. Consent to the filing of this brief has been refused by the respondents.

The movant Anthony J. Distinti is a member in good standing of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (I.B.T.), Local 277, New York City, and is also president of that local union. He files this motion and the annexed brief on his own behalf as an individual and on behalf

of Local 277 whose members have authorized and directed him so to do.

The movant Robert J. Coar is a member in good standing of the I.B.T., Local 701, New Brunswick, New Jersey, and is also the president of that local union. He files this motion and the annexed brief on his own behalf as an individual and on behalf of Local 701 whose members have authorized and directed him so to do.

The movant William J. McKernan is a member in good standing of the I.B.T., Local 617, Jersey City, New Jersey, and is also the Secretary-Treasurer of that local union. He files this motion and the annexed brief on his own behalf as an individual I.B.T. member in good standing and on behalf of Local 617 whose members have authorized and directed him so to do.

The focal point of the questions raised in this Court by the petitioners is a certain Consent Order entered by the United States District Court for the District of Columbia on January 31, 1958, its subsequent Modification by that Court in an Order dated February 9, 1959, and the subsequent judgment of the United States Court of Appeals for the District of Columbia Circuit dated July 9, 1959, modifying in part the February 9, 1959 Order of the District Court.

No notice of the intention to enter the original Consent Order of January 31, 1958, or of its proposed terms was ever given to movants or others similarly situated; nor was notice ever given to movants of the proposed Modification of February 9, 1959. Neither petitioners nor respondents represented the movants or others similarly situated at any time in the United States District Court or in the United States Court of Appeals. Indeed, although movants here were permitted to file a brief as *amici curiae* in the United States Court of Appeals, urging reversal of the District Court on several grounds,

both petitioners and respondents for different reasons opposed such position in the Court of Appeals.

The movants urged below, as *amici curiae*, that Rule 23(c) of the Federal Rules of Civil Procedure required the giving of notice to all members of the class affected thereby of the proposed compromise of a true class action, that the Consent Order of January 31, 1958 was a compromise, that therefore the entry of such order without notice to all members of the class was void *ab initio*. From this, the movants said *a fortiorari* any subsequent order based on the original Consent Order must also be void.

Movants also pointed out in their briefs below that since they were not parties to the Consent Order, had no knowledge of it and no notice of its proposed entry, yet were purportedly bound by it, the Consent Order was void for lack of due process.

The movants also take the position that the judiciary is without authority to create a Board of Monitors—a creation unknown to equity jurisprudence, common law, or statute—vested with broad, undefined powers of investigation and "housecleaning".

The interests of the movants and others similarly situated are affected by these orders and the Board of Monitors created thereby since the future autonomy and very existence of the I.B.T. is threatened by them.

Movants therefore feel that it is important that this Court have brought before it for consideration and decision the questions of: (1) whether the Court below was correct in upholding the District Court's entering a Consent Order in a true class action without giving notice of the terms of the proposed Consent Order under Rule 23(c) to all members of the class affected thereby; (2) whether a Court's proposed order which vitally affected the interests of persons who were not before the

Court was void for lack of due process of law; and (3) whether there is power in the judiciary to create a Board of Monitors vested with broad, undefined authority to investigate and "housecleán".

Movants feel further that in view of the position taken by both petitioners and respondents in the Court below on these questions, and in view of the fact that movants were not parties to the entry of any of the challenged orders (as petitioners and respondents were), that the parties to this cause will not or cannot adequately present the stated questions to this Court, and thus movants offer the annexed brief to contribute to the Court's consideration of all of the issues on the petition for Writ of Certiorari.

Respectfully submitted,

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ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS IS ERRONEOUS AND SHOULD BE REVERSED BECAUSE IT IS BASED ON AN ORIGINAL CONSENT ORDER, AND MODIFICATION THEREOF, BOTH OF WHICH ARE VOID

A. The original complaint was a true class action

Although the petitioners for the Writ of Certiorari argued in the Court of Appeals that the instant cause is not a "true" class action, we think it clear that it is. *Hansberry* v. *Lee*, 311 U.S. 32, 61 S. Ct. 115 (1940); 3 Moore's FEDERAL PRACTICE, 2nd Ed., 3423; *Underwood* v. *Maloney*, 14 F.R.D. 222 (E.D. Pa., 1953). The Court

of Appeals in its opinion in the companion case (No. 15,033, decided June 10, 1959)[1] stated:

> "It seems clear enough that the rights sought to be enforced by the plaintiffs . . . are joint or common . . . thus classifying the rights within section (a)(1) of the Rule. Furthermore, notice of the proposed Consent Decree was not given to all members of the class until after it had been entered."

Thus there is no real issue before this Court concerning whether this was a "true" class action. There is also no question that no notice of the original Consent Order, on which the whole structure of the Monitorship and its authority rests, was given to all members of the class allegedly represented.

B. The Consent Order is a compromise within the meaning of Rule 23(c)

The question then arises, was this Consent Order a compromise within the meaning of that word as used in Rule 23(c)?[2]

[1] Appendix, Petition for Writ of Certiorari, page 63a.

[2] Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

> "(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more of them, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right, and a member of the class thereby becomes entitled to enforce it; . . .
>
> "(c) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the *proposed* dismissal or *compromise* shall be given to all members of the class in such manner as the court directs . . ." (Emphasis supplied.)

The Court of Appeals says:

> ". . . We think it not such a compromise as required advance notice. The Rule applies only to a final disposition of an action either by dismissal or by compromise . . . As Judge Letts said, the consent decree 'is not a final settlement of the essential issue but is interlocutory in nature.'"

But what the Court of Appeals does by this construction is to read language into the Rule which is not there. Put in another fashion, it equates the word "compromise" with the word "dismissal" because it says that only a "final compromise" comes within the meaning of the Rule.

Certainly had that been the intent, the framers of the Rule could have drafted it to say so without undue difficulty.

Nowhere in the Rule is there any language which excepts from its purview provisional compromises, temporary compromises, or interlocutory compromises. Indeed, in the broadest sense, no decree of an equity court with its broad powers of review and modification could ever be said to be "final" within such a ruling as made by the United States Court of Appeals in the language quoted above. Thus, if this language were to be followed, it might be said that any consent order in a class action of an equity nature could be entered without any notice to the other members of the class affected thereby — a situation which would throw wide the doors for fraud and collusive actions affecting the rights of purportedly represented parties who were never before the Court and who had no knowledge of settlements purportedly taken in their interests and *adjudicative of their future rights.* Such a result would be unthinkable, yet inevitable if the doctrine enunciated by the Court of Appeals is allowed to stand.

The Consent Order entered by the United States District Court on January 31, 1958, is a compromise

within the meaning of Rule 23(c) aforesaid, with respect to litigation defined in paragraph (1) of subdivision (a) of the same Rule, and is hence subject to the mandatory notice requirement of Rule 23(c). Because notice was not given to all persons bound or affected by the Order, including but not limited to the *amici curiae*, it is submitted that the Consent Order was void *ab initio*. If this be correct, it is dispositive of the entire Petition for Writ of Certiorari now before the Court. Set forth hereinafter is a legal analysis which *amici curiae* submit compels this conclusion.

The word "compromise" is not a term of limited meaning and has been broadly defined as any arrangement between litigants for settling issues by mutual concessions. 8 Words and Phrases, 311. Black's Law Dictionary, 4th Ed., at page 359, defines the word "compromise" as follows:

> "An arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together . . . A settlement of differences by mutual concessions or an adjustment of matters in dispute by mutual concessions . . ."

The term "settlement," which the United States District Court and counsel for petitioners and respondents used to characterize the Consent Order, thus describes a compromise. That the Consent Order was a compromise is indisputable. It was an arrangement between the original plaintiffs (respondents here) and the Executive Board of the International Brotherhood of Teamsters (petitioners here), determining the litigious issues raised by the complaint and its amendments. Prior to the Consent Order, all rights of the parties to the litigation were determinable as a justiciable controversy by the Court; after entry of the Order, however, all rights of the

parties to the litigation were determinable only by reference to the four corners of the Consent Order itself.

An important consideration in determining whether or not a step taken in class litigation constitutes a "compromise" within the meaning of Rule 23(e) is its effect on other members of the class. *Malcolm* v. *Cities Service Co.*, 2 F.R.D. 405 (D.C. Del., 1942); *Piccard* v. *Sperry Corp.*, 36 F. Supp. 1006 (S.D. N.Y., 1941), affirmed 120 F. 2d 328 (C.A. 2, 1941). The doctrine of *res judicata* applies to true class actions. *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 41 S. Ct. 338 (1921); 3 MOORE'S FEDERAL PRACTICE, 2d Ed., 3470-3472. Applying that doctrine to the instant proceeding, it would appear that after entry of the Consent Order provisionally installing the officers of the defendant International, no member of the International Brotherhood of Teamsters could question the legality of the election of officers at the 17th Convention except in accord with the express or implied terms of the Consent Order itself. Yet the basic objective of the complaint as filed was to set aside the election of officers at the 17th Convention and to secure a new election of officers through the democratic procedures provided by the International constitution. The Consent Order as modified by the District Court and as further modified by the judgment of the Court of Appeals therefore drastically affects the rights of *amici curiae* and other members of the International Brotherhood of Teamsters similarly situated by foreclosing their ability to seek the relief prayed for in the complaint and to challenge the legality of the elections aforesaid. Under the Court of Appeals Judgment there is no immediate prospect of a new convention or election, and there exists a clear danger that the procedures established through the Judgment could exist for so long a period of time as to cause irreparable injury to the International and its constituent bodies which the original Consent Order and

the Judgment of the Court of Appeals were ostensibly designed to protect.

Examined, therefore, in the context of its effect upon *amici curiae* and other members of the International similarly situated, as well as in the context of the meaning of the term "compromise" as construed by the foregoing authorities, the original Consent Order was certainly a compromise.

Curiously, and very significantly, the District Court in its Memorandum Opinion of December 11, 1958,[3] concluded that the Consent Order was not a compromise within the meaning of Rule 23(e) because it was "procedural and within the control of the Court."[4] Rule 23(e) of the Federal Rules of Civil Procedure, it must be noted, is a rule of procedure, and the District Court's conclusion therefore, in this respect, defies analysis.

C. Notice is a mandatory condition precedent to a valid compromise under Rule 23(c) of the Federal Rules of Civil Procedure

Notice to all members of a class who will be bound by a proposed compromise is a mandatory condition precedent to court approval under Rule 23(e) of the Federal Rules of Civil Procedure. *Cross* v. *Oneida Paper Products Co.*, 117 F. Supp. 919 (D.C. N.J., 1954); *Horenden* v. *Chandler*, 8 Fed. Rules Serv. 23c. 1, Case 3, page 517 (D.C. Okla., 1945). The requirement of notice is an expression of public policy designed to protect members of a class, not actually before the court, against unjust and unfair settlements. It has been held that any compromise or dismissal of a class action entered without notice to the members of the class bound by the action will not be given the effect of *res judicata*. *Winkelman* v. *General Motors*

[3] Appendix, Petition for Writ of Certiorari, pages 1a-11a.

[4] Appendix, Petition for Writ of Certiorari, page 10a.

Corp., 39 F. Supp. 826 (S.D. N.Y., 1940). See also *Robertson v. Limestone Mfg. Co.*, 20 F.R.D. 365 (W.D. S.C., 1957); *Cohen v. Young*, 127 F. 2d 721 (C.A. 6, 1942); *Birnbaum v. Birrell*, 17 F.R.D. 409 (S.D. N.Y., 1955).

The recently decided case of *Pittston Co.*, Plaintiff-Appellee, v. *Reeves et al.*, Defendants-Appellees, *Miller*, Intervenor-Appellant, 263 F. 2d 328 (C.A. 7, 1959), is particularly worthy of note by this Court as to the far-reaching effect which the Seventh Circuit has given to Rule 23(c).

In that case, the Pittston Company had informed the Board of Directors of Brink's, Incorporated that Pittston had been offered and intended to purchase the Brink's stock owned by John D. Allen, then the Chairman of Brink's Board. Pittston acquired 44,500 shares of Brink's stock from Allen and his wife at $36 per share about one week thereafter.

The majority of Brink's directors determined to resist the attempt to acquire control of Brink's. Brink's filed suit in the Southern District of New York, praying that Pittston and an affiliate be divested of Brink's stock already acquired and be enjoined from acquiring further stock.

Pittston then brought a stockholders' derivative suit against Brink's and its controlling officers and directors in the Northern District of Illinois, Eastern Division. This suit claimed that Brink's was expending corporate funds to oppose Pittston's proposed acquisition of stock control of Brink's, that the opposition to Pittston was without proper corporate purpose, etc.

While preliminary motions were pending but before issue was joined, the managements of Brink's and Pittston worked out a new basis for Pittston acquiring controlling stock interest in Brink's.

One of the terms of the agreement was that all litigation between the two companies cease and that Pittston's action against Brink's and its controlling officers and directors be dismissed without prejudice to rights of other stockholders. No other shareholder of Brink's sought leave to intervene from the time Pittston began its suit until it was dismissed by consent of both parties and Order of the Court, and it was agreed that the cause be dismissed without prejudice to the rights of redress of any shareholder as to the claims alleged by Pittston in its complaint; that thus the *res judicata* effect of a dismissal under Rule 23(c) of the Federal Rules of Civil Procedure was not sought.

The Court thereupon dismissed.

One year thereafter, another Brink's stockholder moved to vacate that dismissal and intervene. The primary ground urged for vacating the order was that the Court had not required notice to all Brink's stockholders before granting a dismissal without prejudice to their rights. The trial court refused to vacate its dismissal order and refused to allow intervention.

In the face of all of the above recited facts, the United States Court of Appeals for the Seventh Circuit nevertheless ordered the Court below to vacate its order of dismissal, to reinstate the cause of action, and to allow the applicant for intervention to intervene.

The Court said in a concise and precise ruling (at page 329):

> ". . . under Rule 23(c) notice to all class plaintiffs of the proposed dismissal was required. *This mandate is clear and unambiguous.' The District Court had no discretion as to the giving of notice. The failure of the District Court to require notice of the proposed dismissal was a clear violation of Rule 23(c) and the voluntary dismissal order was invalid.*" (Emphasis supplied.)

Under Rule 23(e) the notice required is of a "proposed" dismissal or compromise, and it is therefore clear that such notice must be given before, and not after, entry of a dismissal or compromise. Because of this, it cannot be argued that any notice of the Consent Order, or its terms, published in "THE INTERNATIONAL TEAMSTER" subsequent to entry of the Consent Order "cured" the invalidity of the Consent Order which had been entered without the notice required by Rule 23(e) of the Federal Rules of Civil Procedure.

Failure to follow a "mandatory" statutory provision renders the proceeding to which it relates illegal and void. *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871); *Escoe* v. *Zerbst*, 295 U.S. 490, 55 S. Ct. 818 (1935); 50 Am. Jur., STATUTES, Section 20, pp. 43-44, and cases cited therein.

Even where the parties were personally before the court it has been held that the failure to comply with the requirements of Rule 55(b)(2) of the Federal Rules of Civil Procedure (requiring that three days' notice be given of a hearing on an application for a default judgment) results in a denial of due process, rendering the judgment entered void. *Bass* v. *Hoagland*, 172 F. 2d 205 (C.A. 5, 1949), cert. denied 338 U.S. 816, 70 S. Ct. 57 (1949); *Kon-Mar Airport, Inc.* v. *Toth Aircraft & Accessories*, 12 F.R.D. 399 (W.D. Mo., 1952). Rule 23(e) deals with a far more sensitive situation than does Rule 55(b)(2) since, in the latter instance, the party affected is himself before the court and has the full opportunity to protect his own interests.

In the present case, substantial rights of *amici curiae* and other members of the International Brotherhood of Teamsters have been adversely affected (as members of a class) by the Consent Order even though they were not before the Court and were never given notice of their

right to object to entry of such Consent Order. Because the courts appear unanimous in holding that the notice requirement of Rule 23(e) is mandatory, it is submitted that the Consent Order is void *ab initio*, because the provisions of that Rule were not observed by the United States District Court or the parties in entering the Consent Order. Therefore, the judgment of the United States Court of Appeals is erroneous because it is based on the validity of the Consent Order and its subsequent modification of February 11, 1959, and cannot stand if these fail.

D. The Order of Construction and Modification of the Consent Order by the District Court and the Judgment of the Court of Appeals are invalid inasmuch as they are a construction and modification of an order which is itself invalid

A judgment which is void in the first instance cannot serve as a basis for maintenance of an action thereon. *Western Life Indemnity Co.* v. *Rupp*, 235 U.S. 261, 35 S. Ct. 37 (1914); *Wetmore* v. *Karrick*, 205 U.S. 141, 27 S. Ct. 434 (1907). Such a judgment has no legal effect, binding force, or efficacy for any purpose. It cannot affect, impair, or create rights, and it may be attacked at any time. A void judgment is therefore a nullity, and the general rule is that a void judgment cannot be cured by subsequent proceedings. 30A Am. Jur., JUDGMENTS, Sections 45 and 46. By analogy, an order such as the Consent Order cannot be made to serve as a valid basis for a subsequent order such as the Order of Construction and Modification, or the Judgment of the United States Court of Appeals, nor can the invalidity of the prior Consent Order be cured by a subsequent Order of Construction and Modification.

The invalidity of the Consent Order has been fully demonstrated hereinabove. To allow it to serve as the basis for a valid order of modification or, in the alternative, to allow the Order of Modification to cure its basic

invalidity would derogate from the fundamental tenets of due process which the Fifth Amendment to the Constitution of the United States secures.

II. THE ORDER OF CONSTRUCTION AND MODIFICATION ENTERED BY THE DISTRICT COURT ON FEBRUARY 9, 1959, AS MODIFIED BY THE COURT OF APPEALS JUDGMENT OF JULY 9, 1959, IS VOID FOR WANT OF DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE NOTICE THEREOF AND AN OPPORTUNITY TO BE HEARD THEREON WERE NOT ACCORDED TO ALL PERSONS BOUND BY THAT ORDER

It is a cardinal principle of Anglo-American jurisprudence that one is not bound by a judgment in personam in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878). To this rule there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a class or representative suit to which some members of the class are parties may bind members of that class or those represented who were not made parties to it. *Smith* v. *Swormstedt*, 16 How. 288, 14 L. Ed. 942 (1853); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 41 S. Ct. 338 (1921). But their interests need to be identical and not adverse and the class (plaintiffs) must adequately represent the non-existent members of the class. *Giordano* v. *Radio Corp. of Am.*, 183 F. 2d 558 (C.A. 3, 1950).

Perhaps the best enunciation of the principle that the Courts must zealously guard the rights of so-called members of a class who are not personally before the Court is contained in this Court's opinion in *Hansberry* v. *Lee*, 311 U.S. 32; 61 S. Ct. 115 (1940). In that case, this Court denied the effect of *res judicata* to a judgment of the state court in the purported class action on the ground that the plaintiffs in the first action, who had sought to enforce a restrictive covenant applicable to the land within a certain area, did not adequately represent the defendants

in the second action who, although owners of the land within the area, desired to void the restrictions. This Court said (311 U.S. 32, 44-45):

> "Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard which due process exacts, can some be permitted to stand in judgment for all.
>
> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. [Citing cases.] It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. [Citing cases.] Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants. . . ."

Although the foregoing authorities indicate that adequate representation is a condition precedent to the maintenance of a class action, the conspicuous absence of such finding

in the instant litigation leaves little room for doubt of the representative inadequacy of the original parties plaintiff (respondents here). Surely thirteen members of the International Brotherhood of Teamsters cannot be said under the circumstances to fairly or adequately represent the full class of 1,600,000 members. See *Isaac* v. *Milton Mfg. Co.*, 33 F. Supp. 732 (M.D. Pa., 1940).

III. THE DISTRICT COURT DID NOT HAVE THE JUDICIAL POWER TO CREATE A BOARD OF MONITORS VESTED WITH BROAD UNDEFINED POWERS OF INVESTIGATION AND "HOUSECLEANING," AND THE COURT OF APPEALS WAS IN ERROR IN UPHOLDING THAT POWER

Judicial power is "the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat* v. *United States*, 219 U.S. 346, 356, 31 S. Ct. 250 (1911). Pronouncements, policies, and programs of validly subsisting corporations or associations, their directors and officers, or their motives and desires do not give rise to a justiciable controversy save as they have fruition in action of a definite and concrete character constituting an actual or a threatened interference with the rights of persons complaining. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324, 56 S. Ct. 466 (1936).

Because the internal affairs of labor unions do not normally give rise to justiciable controversies subject to the judicial power of the court, the judiciary has historically refused to interfere in the internal affairs of labor unions. *Fish* v. *Huddell*, 60 App. D.C. 263, 51 F. 2d 319 (C.A. D.C., 1931); *Courant* v. *International Photographers*, 176 F. 2d 1000 (C.A. 9, 1949); *Green* v. *Obergfell*, 73 App. D.C. 298, 121 F. 2d 46 (C.A. D.C., 1941).

In recognition of the time-tested principle that courts have powers to decide judicial controversies only, the Court of Appeals for the Third Circuit, in *Webster Eisenlohr*

v. *Kalodney*, 145 F. 2d 316 (C.A. 3, 1944), cert. denied 325 U.S. 867, 65 S. Ct. 1404 (1945), a representative action brought by a preferred stockholder on behalf of all preferred stockholders alleging fraud and denying such stockholders exclusive voting rights on default of payment of dividends as provided in the certificate of incorporation, said:

> "The fundamental proposition which probably no one would dispute is that a court's power is judicial only, not administrative, nor investigative. A judgment may only properly be given for something raised in the course of a litigation between the parties . . .
>
> "Masters are provided for in the Rules of Civil Procedure, Rule 53. This rule does not, in so many words, place any limitation on the scope of a master's commission. Nor has that question, apparently, been the subject of a great deal of litigation. There are general statements supporting the view that an order of reference cannot be more extensive than the allegations and proofs of the parties and there is some judicial authority to this effect. No authority has been found the other way.
>
> "On principle, however, the matter seems clear. Rule 53 is explicit in its statement that 'A reference to a master shall be the exception and not the rule' and that in actions to be tried without a jury 'a reference shall be made only upon a showing that some exceptional condition requires it.' It is clear, we think, that a master is appointed only to help the court in a case where the help is needed. His appointment and activities are only for the purpose of assisting the court to get at the facts and arrive at a correct result in a complicated piece of litigation pending before the court. The master operates as an arm of the court. Surely he has no wider scope of activity than the court itself. If the court is limited in its judicial duties, to deciding the issues presented in the litigation before it, the master's function can go no further than to aid in the court's discharge of its duties . . ."

Certainly in the instant cause, the Board of Monitors have gone much further than "to aid in the Court's discharge of its duties . . . ."

To the best knowledge of *amici curiae*, no such legal incubus as a Board of Monitors with obviously broad powers which equally obviously are undefined in scope has ever before been attempted by a Court. Indeed, Mr. Justice Frankfurter, in denying a stay of the Judgment of the Court of Appeals sought by petitioners in this cause, recognized that the Monitorship was an unusual creation, stating (p. 3 of the August 4, 1959 Opinion of Mr. Justice Frankfurter, as Acting Circuit Justice):

> "As is recognized by all concerned, judicial supervision of a union with a membership of 1,500,000 and some 800 locals through the agency of a mechanism like the Board of Monitors is an unusual manifestation of equity powers. . . ."

Judicial power of the court may not be validly delegated. *Cadenartori v. Marine Midland Trust Co.*, 18 F.R.D. 277 (S.D. N.Y., 1955). Logically, investigatory powers beyond the inherent power of the court are hardly delegable inasmuch as it is manifestly impossible to confer as an act of judicial power a function which does not inhere in a judicial body. *Webster Eisenlohr v. Kaladner*, *supra*; *Cadenartori v. Marine Midland Trust Co.*, *supra*. Neither the Court nor any of its lawfully constituted delegates, i.e., the Monitors have any power to interfere with the internal affairs of the International union or its constituent bodies inasmuch as such powers do not inhere in the judiciary. Logically, then, the District Court had no power or authority to undertake on its own initiative a "general housecleaning" of the International union.

The effect of the Judgment of the Court of Appeals of July 9, 1959 is to maintain the Monitorship system on an apparently self perpetuating basis. The system is

cumbersome, expensive, and gnaws at the very vitals of autonomy and self-determination in union affairs.

For these reasons it has become apparent that the interests of the original plaintiffs are not coextensive or even parallel to the interests of *amici curiae* so that the original plaintiffs cannot be said to adequately, faithfully, or fairly represent the interests of the *amici curiae* in this cause either here or in the courts below.

CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully suggest that the petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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OCT 19 1959
JAMES R. BROWNING, Clerk

No. 415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JOHN F. ENGLISH, ET AL., *Petitioners*

vs.

JOHN CUNNINGHAM, ET AL., *Respondents*

ON APPLICATION FOR STAY

OPPOSITION OF THE BOARD OF MONITORS

MARTIN F. O'DONOGHUE
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October 19, 1959

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1. The Facts

The facts of this case are set forth in the opinion of the Court of Appeals in *English* v. *Cunningham*, No. 14983, June 10, 1959, the supplemental opinion of July 9, 1959, the judgment of that court entered July 9, 1959, and the Brief in Opposition to Petition for Certiorari filed contemporaneously herewith.[1]

---

[1] Motion for leave to participate in this case is incorporated in the opposition to certiorari.

The court of appeals flatly refused petitioners a stay. Mr. Justice Frankfurter also refused petitioners a stay. Both rulings were clearly correct because petitioners have abjectly failed to demonstrate any irreparable injury. Their failure is highlighted by their resort to general platitudes predicting horrifying results rather than specifying to this Court wherein damage may be suffered.[2]

Petitioners seek review of a "judgment of the Court of Appeals" and a stay of "said judgment" in the event of certiorari.[3] Having sought to stay a specific judgment, petitioners submerge in generalities the specific obligations of that judgment.

Ignoring momentarily the broad gauge allegations of the stay petition, the sole issue is whether the judgment of the Court of Appeals interpreting the Consent Order of January 31, 1958 creates irreparable injury. Any injury flowing from the Consent Order itself has been agreed to as has the immense benefit to rank and file members whose interest the Consent Order was designed to benefit.

2. No Injury

There is a complete lack of the necessary predicate, irreparable injury, for calling to a halt the beneficial Monitorship. The petitioners make no attempt to specify wherein such damage exists. Indeed, they can-

[2] Petitioners have effectively admitted no irreparable injury exists here by their dilatory tactics in seeking certiorari and a stay from this Court. The Court of Appeals denied petitioners' stay request July 15, 1959. Despite admonitions by Mr. Justice Frankfurter to file the petition for certiorari immediately, the petition was not filed until September 18, 1959.

[3] Appl. for stay, p. 1.

not. This explains the "why" of the generalizations upon which they base their claim for equitable relief. Having assumed the onerous burden to demonstrate why this Court should grant extraordinary relief, is it not revealing that instead of clarity there is obfuscation?

In the Appendix hereto is a succinct outline of the present status of the judgment in issue. The Appendix discloses why petitioners generalize rather than make specific claims of injury, for substantial portions of the judgment have either been agreed to or are moot.

Significantly, petitioners refer to but one paragraph of the Court of Appeals judgment as grounds for stay, namely the Local 183 and 959 merger problem in paragraph 2 of the judgment. The only obligation there specified is to seek agreement on a new remedy—failing which a new and appealable order may be entered by the district court.

Considering the other generalities upon which petitioners seek equitable relief, a cursory examination of the opinion and judgment of the Court of Appeals proves without further comment that the activities of the Monitors are limited to those to which Hoffa and his slate have consented, and such activities cannot, except with the aid of an unfettered imagination, substitute the Monitors for the provisional officers or determine policy matters of the Union. If even a portion of the appalling results now forecast were possible, the Court of Appeals would never have upheld the action of the trial court.

Had there been a good faith compliance with the obligations assumed under the Consent Order the Monitorship would have terminated almost a year ago

and further costs connected therewith would have ceased. But having agreed to the Consent Order, the costs incurred thereunder cannot be relied upon to show irreparable injuries.

The balance of the request for stay deals with issues which have not and may never be presented to the district court. Since the Monitors may recommend, not command, until the district court acts there is nothing to review either in this Court or in the Court of Appeals.[4] This is emphasized by petitioners' argument that the appointment of counsel to the Board of Monitors causes petitioners irreparable injury. Yet, that issue is not before this Court, the Court of Appeals having stayed the appointment.

3. Injury to Beneficiaries of the Consent Order

Aside from the abysmal failure to show any cognizable reason for a stay, to enjoin the Board of Monitors from fulfilling its judicially imposed obligations would rend the fabric of the Consent Order. The worthy purposes of the Order—establishing fiduciary standards for union officials, removing conflicts of interest, establishing election rules which insure honest elections so that local officials may not perpetuate their office by rigging elections—will be lost.

In November and December of this year, elections will be held in approximately 400 local unions. If proper election rules are not adopted, discredited election practices will be continued under the protective cloak of this Court's stay order. Yet, to correct these

[4] One of the local officers the Monitors recommended be suspended has been indicted for labor extortion. As of this date he remains in office.

practices is one of the cornerstones of the Consent Order. Without honest democratic elections, any abuses that exist will remain.

Provisional General President Hoffa and the Monitors have agreed upon temporary rules of election which Provisional General President Hoffa has already sent to the local unions for adoption. The remaining issue is what steps will be taken to insure that the local unions will adopt these election rules.

Submitting to elections governed by proper rules will permit the will of the majority of rank and file members to prevail. Granting a stay harms not Teamster officials, harms not the Monitors, but would visit an unintended punishment on the rank and file members of the Union who are seeking the right to participate in democratic elections.

To grant a stay at this time would prevent the Board of Monitors from functioning in an advisory capacity to see that the temporary rules of election are adopted and followed in good faith because, under the temporary rules of election, pre-election and post-election protests may be reviewed by the Board of Monitors and recommendations made to the General President. A stay would impede returning the more than fifty trusteed locals to self-government.

Irreparable injury would not flow from a continuation in force of those portions of the Consent Order requiring adherence to fiduciary standards by those who handle Union funds. To state the principle is to refute it. Certainly fiduciary standards benefit the rank and file. The onus of compliance falls on those leaders who should embrace such standards rather than seek to overturn or avoid them.

And the continuance of the provision forbidding officers of the International from having interests conflicting with their elective duties scarcely seems a hardship, much less the cause of irreparable injury.

The elaborate verbal edifice designed to demonstrate injury to petitioners is, upon analysis, just that. Here then is absent the requisite "clear case," the "cogent reasons," which must appear before the deliberate action of the Court of Appeals is disregarded and a stay granted. *Magnum Import Co. v. Coty*, 262 U.S. 159, 164.

Provisional President Hoffa and his slate have been in office since January, 1958. After vainly attempting in bad faith to avoid their correlative obligations under the decree, they now seek judicial surcease. This must not be granted until full compliance has been achieved.

Conclusion

It appearing that a stay order of this Court would deprive the rank and file members of the Union of the benefits of the Consent Order and that petitioners' generalities in support of their stay are woefully inadequate, it follows the petition for stay must be summarily denied.

Respectfully submitted,

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Chairman of the Board of Monitors
831 Tower Building
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[5] Aside from other failings, the Stay Petition in conjunction with the petition for certiorari has not made a "strong showing of ultimate success on the merits." *Virginia Pet. Job. Ass'n. v. Fed P. Com.*, 259 F. 2d 921 (D. C. Cir. 1958).

APPENDIX

The following is a brief summary of the status of the actions required under the judgment of the Court of Appeals.[1]

1. Paragraph 1(a) of the judgment requires the defendants within 30 days to make good faith efforts to modify an injunction of the Court of Common Pleas of the City of Philadelphia or in the alternative institute new proceedings. The record before the district court in November, 1958 finds counsel for petitioners agreeing that F. Joseph Donohue would serve as a public member on the panel to hear charges directed to Local 107 (J.A. 534). Counsel has agreed to seek dissolution of the injunction. (Ex. A hereto).

2. Paragraph 1(b). Provisional General President Hoffa, has already complied with this paragraph by directing Local 245 to permit Price Waterhouse and Company to audit the books.[2]

3. Paragraph 1(c) of the judgment is another direction for audit and President Hoffa, by letter of July 10, 1959, has directed officers of the Local concerned to provide the auditor with "all available information."

4. Paragraph 1(d) calls only for a discussion of the Price Waterhouse report and placing it on the agenda for the October, 1959 General Executive Board Meeting.

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[1] The judgment is found at page 54a of the Petition for Certiorari.

[2] It is interpolated that when Price Waterhouse commenced the audit certain key records were mysteriously missing. Mr. Harold Gibbons, International Vice President and executive assistant to President Hoffa, has been the Trustee of Local 245 for several years. The Monitors reported the situation to the district court and requested the right to take depositions to ascertain the location of the missing records. This request has not been acted upon. These records were present in January, 1959 and were the subject of a Monitorial recommendation in June of 1958.

5. Paragraph 1(e) of the judgment which has subsequently been modified by an agreed order in the district court requires an investigation of charges against Vice-President Brennan concerning alleged misuse of funds of the Michigan Conference Welfare Fund. The International has appointed the special attorney required and has arranged for an audit. Whether the evidence will result in charges is unknown. The Monitors do not know if the special counsel who was retained September 25, 1959 has filed a report. How a fair trial of an International officer on charges of mishandling funds can cause petitioners irreparable injury is not spelled out.

6. Paragraph 1(f) of the judgment regarding charges against a Mr. Feldman requires petitioners to conclude their investigation by August 8, 1959, submit a report to the Monitors by August 28, and by September 27, 1959, conclude the hearing on the charges against Feldman. Since it is assumed petitioners have complied with the order, the paragraph is moot.

7. Paragraph 1(g) of the judgment requires the publishing of a statement of Monitorial activity in the International Teamster. As early as August 21, 1958, General President Hoffa stated that the "International [would] comply with the original Monitors request to any reasonable degree" (J.A. 501).

8. Paragraph 1(h) of the judgment deals with the suspension of Messrs. Smith and Bolling, two officers of Local 515, and an investigation, charges and an audit with reference to the allegations that $20,000.00 was paid to the judge for an alleged "fix" of a criminal trial. President Hoffa in August, 1958, advised the Monitors that charges were preferred against the officers and they were suspended.[3]

[3] In an income tax evasion case involving these two officers, the trial judge stated:

"If this case involved the sufficiency of the evidence to estab

9. Paragraph 1(i) relates to the discussion of means of securing adoption of election rules. The Board of Monitors and petitioners have agreed upon temporary rules of election for trusteed and autonomous local unions. Consequently, a stay of this paragraph would prevent the Monitors from advising and recommending procedures necessary to make these rules meaningful.

There is disagreement between the Monitors and Defendant International on the question as to whether or not General President Hoffa should postpone the date for nominations and elections in local unions where, because of the time element, the membership of the local union would not have the opportunity to vote upon whether to accept or reject the new temporary rules of election.[1] The Monitors advise this Court that Provisional General President Hoffa by letter dated October 13, 1959, recommended that the temporary rules of election be adopted.

> lished a criminal conspiracy upon the part of Local Union No. 515 at Chattanooga, its officers and members to attempt the bribery of a Criminal Court Judge and to thwart the administration of justice; or if it involved the moral fitness of certain of its officers to discharge the responsible duties entrusted to them, there would be no doubt that the charges were well founded. For the record in the case is a sordid expose of the illicit affairs of this Local Union and its officers, aided and abetted by officers of the International Union of Teamsters reflecting a shocking and callous disregard of duty and responsibility under the law. That the defendant Smith as President of the Local was one of the leading figures in such conspiracy, that he attempted to conceal his illegal activities and schemes by false statements and falsification of records, and that he is morally unfit to hold the important position entrusted to him unmistakably appear from his own testimony". *United States* v. *Smith*, DC MD Tenn. July 23, 1959, No. 12,584.

[1] Under Article XXI, Section 5, the General President has the authority to postpone the date and time for holding local union nominations and elections.

The temporary rules of election having been agreed upon, paragraph 10 of the judgment relating to the eligibility of members on check-off to run for office has also become moot because, under the new temporary rules for elections, Section 401(e) of the Labor Management Reporting and Disclosure Act of 1959 (Publ. L. 86-257, 86th Cong., 1st Session) was incorporated in the rules and taken verbatim from the statute.

10. Paragraph 2 of the judgment relates to the merger of Local Unions 183 and 959 which has been covered in the Opposition for Stay. This paragraph requires only discussion.

11. Paragraph 3 of the judgment requires the provisional officers and the Teamster Union to "cooperate and assist the Monitors in accomplishing the basic purposes and various provisions of the Consent Order. This paragraph is merely an iteration of the duty of any individual who is subject to an order of a Federal District Court.[5]

12. Paragraph 4 of the judgment merely extends the time within which the Consent Order shall be effective until at least February 9, 1960. There is the possibility that under this paragraph the entire case shall become moot prior to the time the Supreme Court could render an opinion, assuming *certiorari* were granted. Furthermore, since Hoffa and his slate consented to the entry of the original order in question, it is inconceivable that the existence of the order and the Monitorship until February 9, 1960 or longer would create irreparable injury, particularly since petitioners are willing to forego a national convention.[6]

13. Paragraphs 5, 6 and 7 of the judgment have no bearing on the stay petition.[7]

[5] The only significance of this paragraph is the fact the court felt it necessary to enter it.

[6] Such conventions are customarily held once every five years. The next one would be due in 1962.

[7] See letter of counsel, exhibit A hereto.

14. Paragraph 8 of the judgment has been complied with and is moot.

15. Paragraph 9 of the judgment requires the further order of the District Court and consequently no action of this Court is indicated.

16. Paragraph 10 requires that until proper notice of eligibility requirements for voting and candidacy be properly given Teamster members the provisions of the earlier constitution will apply. Since petitioners in the three months since the judgment have taken no steps to give proper notice to the rank and file, it is assumed that the matter is of no pressing importance. For a further discussion of this paragraph 10, see paragraph 9 of this Appendix.

Exhibit A

LAW OFFICES
EDWARD BENNETT WILLIAMS
1000 Hill Building
Washington 6, D. C.

MEtropolitan 8-6565

August 7, 1959

Martin F. O'Donoghue, Esquire
Chairman, Board of Monitors
831 Tower Building
Washington 5, D. C.

Re: Status of Compliance—
Judgment of July 9, 1959

Dear Mr. O'Donoghue:

Now that Justice Frankfurter has denied our application for a stay and since thirty days have elapsed from the entry of judgment by the Court of Appeals in the case of *English, et al.* v. *Cunningham, et al.*, it seems appropriate that we report to the Board of Monitors the steps

which the International Union has taken to comply with the judgment.

Paragraph 1 (a). I have written to John Rogers Carroll, Esquire, who represented the officers of Local #107, and suggested a voluntary dissolution of the pending injunction. Mr. Carroll advised me that he no longer represents the officers but he passed my letter on to Ray Cohen and his attorney, Richard Markowitz, Esquire. Copies of the correspondence are enclosed. As you can see, we offered to accede to the local in all particulars save the use of a public member on the panel. No reply has yet been received. If none is forthcoming, in a reasonable period of time, or, if the officers reject our offer, we shall seek a meeting with the Monitors to discuss the next step in carrying out the court's order.

Paragraph 1 (b) and 1 (c). By letters dated July 10, 1959, copies of which were previously furnished, the audits in question were ordered.

Paragraph 1 (d). Representatives of Price Waterhouse will be invited to the next regular session of the General Executive Board. Meanwhile, the letter of July 22, 1958, will be studied.

Paragraph 1 (e). This has been in suspension since July 24th pending decision on the stay application. Now that the application has been denied, we will be in consultation with the Monitors regarding the selection of special counsel.

Paragraph 1 (f). Feldman's suspension has been continued and an investigation concluded. The report of this investigation will be furnished within a very short period of time.

Paragraph 1 (g) requires the International to initiate no action.

Paragraph 1 (h). Smith and Boling were effectively suspended and do not now hold office. An investigation of the acquisition of the funds from the Southern Confer-

ence has been completed by Edwin N. Pierce, Esquire, of Atlanta and his report is now being prepared. You will promptly be provided with copies of the report and charges will be filed, if warranted. A Price Waterhouse audit of Local #575 was ordered by letter dated July 10, 1950, a copy of which you already have.

Paragraph 1 (i). We are now prepared to meet and continue the discussion which was, with your approval, adjourned last week.

Paragraph 2. We are prepared to meet and discuss "a remedy for the situation" in Alaska.

Paragraphs 3, 4, 5, 6, 7 and 9 require no affirmative action on behalf of the International officers.

Paragraph 8. The statement relating to Godfrey P. Schmidt will appear in the September issue of the *International Teamster*.

Paragraph 10. International officers are prepared, of course, to accept this ruling but it would appear to be very closely related to the action required under pagagraph 1 (i).

Very truly yours,

RAYMOND W. BERGAN

P.S. I have just been advised that Dick Markowitz, the attorney for the officers of #107, will be present at the Greenbrier conference the week of August 17th. If I do not hear from him by then, or if before then he rejects our offer, I will again discuss the matter with him personally at that time.

R.W.B.
8 21 59. Copy sent to Mr. Smith
w enclosures.

Enclosures

cc: Mr. James R. Hoffa
David Previant, Esquire
Daniel B. Maher, Esquire

[redacted] COPY

Office-Supreme Court, U.S.
FILED

FILE COPY

SUPREME COURT, U.S.
FILED
OCT 19 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

JOHN F. ENGLISH, ET AL., *Petitioners*

v.

JOHN CUNNINGHAM, ET AL., *Respondents*

BRIEF IN OPPOSITION

To Petition For Certiorari

GODFREY P. SCHMIDT
12 East 41st Street
New York 17, New York

Attorney for Respondents
except John Cunningham

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1959

No. 415

JOHN F. ENGLISH, ET AL., *Petitioners*

v.

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BRIEF IN OPPOSITION

To Petition For Certiorari

QUESTIONS PRESENTED

I. Did the court of appeals and the trial court properly interpret the consent order of January 31, 1958?

II. Did those courts properly hold that the consent order could be revised to extend its term to at least February 9, 1960, petitioners having engaged in conduct that obstructed enforcement of their obligations under the consent order?

STATEMENT OF THE CASE

On September 19, 1957, respondents filed the original complaint herein, alleging a long series of malfeasances perpetrated, encouraged or tolerated by petitioners,

including (a) violation of the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the International Organization), (b) rigging of the 17th Convention of the International Organization, (c) misappropriation or misuse of union funds, (d) refusals of financial accounting, (e) failure to keep adequate financial and other records, (f) widespread and calculated violation of the democratic rights of worker-members, (g) rigging of elections in subordinate bodies of the International Organization, (h) misuse of trusteeships, (i) resort to violence, threats and intimidation. (J.A. 1)

In their complaint respondents sought an injunction to restrain such abuses and to prevent rigged elections. They also requested a new election of delegates and elimination of all of the abuses which constituted a barrier to a fair convention and election. To effectuate these objectives, the complainants requested appointment of "a receiver or board of receivers, a master in equity or masters in equity" authorized, among other things, to assist the district court in eliminating the conditions and abuses preventing a fair election, to establish sound and democratic election procedures, to act as officers of the court pending proper convocation of a new convention and eventually to report to the court when such a convention "convened pursuant to the order of this Court" should be called and complete autonomy should be restored to *de jure* officers of the International Organization.

The trial began on December 2, 1957, and lasted for 22 days, when counsel for petitioners suggested negotiations for the purpose of obviating the necessity

for further trial. These negotiations resulted in the consent order of January 31, 1958. (J.A. 58; J.A. 72-73, 76, 78-79, 80-82; 97-98, 99-100; 116, paragraph III; 424, 426-428, 434, 437-475; Initial Report of Board of Monitors to Judge Letts, Defendants' Exhibit 20, pages 168-173)

Under the consent order petitioners were permitted to take office "provisionally." These provisional officers were expected to take the initiative for the purpose of clearing the ground for a fair future convention and election and for the purpose of vindicating the constitutional and other rights of the union membership, especially where such vindication was a fair and reasonable prerequisite to an honest and constitutional election. The consent order also provided that where the provisional officers failed to take initiative for these purposes, the Monitors had the duty to recommend agenda to the district court to implement their obligations under the consent order.

At the time of the framing of the consent order, the parties understood that the Monitors were to seek enforcement by the district court of recommendations after full hearing where such recommendations were reasonable and within the terms of the consent order. The parties also understood that the litigation was not terminated but continued by the interlocutory consent order. (J.A. 473-475) The last sentence of Section 2 of the consent order was added at the instance of the district court itself for the purpose of emphasizing the court's power to enforce reasonable recommendations of the Monitors relative to purposes of the consent order where petitioners might obstruct those purposes. Under the consent order the Monitors never claimed

nor exercised mandatory (as distinguished from recommendatory) powers. The Monitors also understood that they were not required to be passive and indifferent observers where petitioners (because of bad will or some other arbitrary purpose) flouted the consent order. The Monitors were charged with the duty to make application to the court to refer such issues as the petitioners' compliance or lack of it for appropriate court action.

All that has been detailed above, was recognized by petitioners' counsel in a statement to the Senate Select Committee on Improper Activities in the Labor or Management Field on August 5, 1958, (Senate Select Committee Hearings, Part 36, beginning page 13,279):

> MR. WILLIAMS: Yes sir . . . under this Consent Decree . . . the Board of Monitors is given jurisdiction over, first of all, democratic procedures within the union . . .
>
> In other words, they have been given the jurisdiction, voluntarily, by the I. B. T. to police intra union democracy.
>
> Secondly, they have been given jurisdiction voluntarily by the International under the presidency of the witness (Mr. Hoffa) to police financial and accounting controls and procedures of the International.
>
> They are authorized to, and they have already, Senator Mundt, made an audit of the International through Price Waterhouse, and they are continuing to make other audits at the local levels through this same accounting firm.
>
> In addition they have been empowered to see that no officer of the International has any conflict of interest in the performance of his duties. In other words, if any officers of the International

> has anything which can be construed as an investment which might conflict, or an interest which might conflict with the full performance of his duties to the International, they have the authority to police this and bring it to the attention of the court . . . (pp. 13,279-80)

In this same connection, see also Hearings, Senate Select Committee, Part 36, pages 13,280-83.

ARGUMENT

I. The district court had ample equitable power to issue orders and to make interpretations and the single modification complained of by petitioners

The situation which evoked the complaints herein was one of the most flagrant in trade union history in this country. The numerous and grievous violations of the International Organization's Constitution and of sound trade union practice amounted to a serious breach of the contract represented by that Constitution, as well as the Constitution of the AFL-CIO, which during the trial below expelled the International Organization. It was in these circumstances that respondents, as rank and file union members brought suit.

Courts of equity have always exercised, in the interest of law and justice, a wholesome ingenuity in framing remedies to solve particular problems. See the principles and cases collected in Pomeroy, *A Treatise on Equity Jurisprudence*, Sections 109 and 111. Of particular importance is that justice be administered and rights be vindicated even if novel. *Brent* v. *Bank of Washington*, 10 Pet. 596. Chancellors have frequently followed the maxim, *Ubi jus ibi remedium*. (Pomeroy, *op. cit.*, Section 423) And this Court has tolerated no grievous wrongs such as those

shown here without providing a remedy. *Independent Wireless & Telegraph Co.* v. *Radio Corp. of America*, 269 U.S. 457.

The Monitorship was certainly an appropriate tool for safeguarding rights whose violation by petitioners had prompted the complaints herein. Petitioners' misdeeds in this case need no emphasis. They suggest and demand, as imperiously as the language of the court order does, the interpretation and modification of which petitioners complain. Their complaint in this respect disregards the public interest and must be disallowed. *Joy* v. *St. Louis*, 138 U.S. 1; *Bowman* v. *Wathen*, 1 How. 189; *United States* v. *Morgan*, 307 U.S. 183; *Porter* v. *Warner Holding Co.*, 328 U.S. 395; *Pennsylvania* v. *Williams*, 294 U.S. 176.

The Monitorship avoided two extremes: (1) surrender of full and untrammelled power and authority to petitioners Hoffa and his associates; and (2) operation of the International Organization by a board of receivers. The Monitorship seemed the best method available for the purpose of (a) providing the "provisional" officers with an opportunity to effectuate reforms, (b) vindicating the rights of the union membership, (c) making available to petitioners the advice and recommendations of a tripartite panel whose broad interests covered all segments of the membership. Such a method contemplated (but has not produced, in view of petitioners' policy of litigous obstruction) a step by step clearance of the ground encumbered by obstructions to a fair convention and election. The generalities of the objectives set forth in the consent order had to be determined, or translated into specifics, by proper initiatives or decisions of petitioners as "pro-

visional" officers of the International Organization or by recommendations of the Monitors.

The district court could not be expected to develop the minutiae necessarily involved in arranging for a proper convention and election. The Monitors were established as court officers to assist the parties and the court in filtering out of the total series of difficulties and practical problems encountered on the way to a convention those which could not be settled by agreement of the parties. Thus, the court's function was judicial only, not administrative nor investigative. The consent order gave the Monitors the task of trying in the first instance to work out details with petitioners. Where this was not possible, controversy as to the concrete fulfillment of the decree would be referred back to the court of decision.

II. The court below properly construed the consent order

(a) The consent order, borne out of the complaints below and the respondents' case on the trial, was an interlocutory compromise. It was supposed to initiate a second, constructive phase thereof. It was hardly likely that petitioners would have approved the consent order if they had had a good defense against the underlying complaints. In the light of the complaints and the trial below, and of judicially noticeable data, the consent order is, thus, an appropriate interlocutory compromise. Like all treaties and contracts, it was based on promises—which petitioners have since breached.

(b) The text of the consent order speaks for itself. Under it the district court has and retains all mandatory, equitable powers which petitioners erroneously

charged the Monitors with usurping. Petitioners' theory is equivalent to the suggestion that Mr. Hoffa and his associates have the right, in their unfettered judgment, to reject every recommendation of the Monitors no matter what its merit or necessity; and the court has no right even to consider an issue raised by the arbitrariness or bad faith of such rejection. Such an interpretation strips the consent order of the express power granted by the last sentence of Section 2, which specifies supervision and direction by the district court and enforcement of recommendations, arbitrarily or corruptly spurned.

Indeed, the basic argument of petitioners is equivalent to the thesis that under the consent order the parties agreed that petitioners shall have a right to be arbitrary or to act in bad faith. They deny that the Monitors, as officers of the court, have the right to seek the direction and supervision of the court and enforcement by the court of the consent order's obligations. They assert, in effect, their own absolute right of non-compliance. They are saying, equivalently, that the consent order guarantees petitioner Hoffa and his associates the right as "provisional" officers to use their undisciplined voluntarism, no matter how fainted with arbitrariness, bad faith or a desire to shield misdeeds. Since equity does nothing in vain and looks to substance rather than form, the "supervision" and "discretion" mentioned in Section 2 of the consent order must, in the interest of rationality, be related to fulfillment of that order. The power of the court below to supervise and direct the Monitors in the performance of their enumerated duties would be an adventure in blank futility, if the court's supervision and direction could be obstructed with impunity by bad-will or arbitrariness.

Actually, the consent order documents the parties' desire (a) to eliminate the effects of the rigging of the 17th Convention, (b) to terminate unconstitutional abuses, (c) to fix a new convention and election as soon as possible after removal of the barriers still preventing fair election, and (d) to provide the parties and the Monitors with a ready forum to settle disputes in working out objectives (a), (b) and (c) just enumerated. Behind all petitioners' arguments is the more or less visible contention that petitioner, Hoffa, by the consent order obligated himself only *to listen* to recommendations or *to consider* these recommendations; then to do as he jolly well pleases, regardless of the court or anyone else. Such an "interpretation" completely denudes this judicial order of sanction. It is like a law without penalty. In contrast, the courts below by their reasonable interpretation have given the decree a meaning in line with the intention of the parties, the realities of the situation, the principles of sound trade unionism and the public interest.

III. Petitioners' arguments are fallacious

(a) The petition for certiorari employs as one of its logical premises a false and oversimplified notion of the complaints below and of the relief sought by complainants. Repeatedly, the petition suggests that the complainants' basic and immediate objectives was only a new election or convention. (Petition for Certiorari, pp. 2, 9, 12, 14, 15, 16, 17, 18, 20, 24, 25, 27, 35). To hold a new convention with the same rigged machinery would merely permit a second rigging. It was, therefore, as important to the complainants to extirpate the effects of the rigging and to dissipate the atmosphere of coercion and domination which that rigging engendered. The consent order contains many reme-

dial stipulations in addition to provision for an ultimate convention. These stipulations, if carried into action, would effectively accomplish the intermediate but essential objectives: removal of the hindrances to a free election. There would be no need for a Monitorship (or a board of receivers or masters in equity such as the plaintiffs requested in their complaint) if all that was needed or asked was a new convention after one year. Thus, the petition for certiorari misstates the intent and motives of the parties when they framed the consent order. (Petition for Certiorari, pp. 16, 17, 22, 34, 35) The parties intended and agreed that the consent order was interlocutory in character precisely because of the important intermediate objectives just mentioned (J.A. 58; 72-73, 76, 78-79, 81-82; 97-98, 99-100; 416, paragraph III; 424, 426-428, 434, 473-475; Initial Report of Board of Monitors to Judge Letts, Defendants' Exhibit 20, pages 168-173), as well as the elimination and correction of financial abuses.

It is impossible to square the text of the consent order with petitioners' contentions. If the primary and basic objective of the parties and of the Monitorship was simply an election after one year, why were the other than election stipulations added?

(b) Petitioners seem to read the consent order as if it imposed upon them no legal or moral obligation beyond doing what they, independently, prefer to do. (Petition for Certiorari, pp. 5, 7, 9, 10, 17, 19-21, 29-32) It is difficult to discover a trace of real obligation in petitioners' theory that the court has no power whatever to enforce the consent order. At least, petitioners' contentions are devoid of any recognition of obligation beyond a perfunctory "duty" *to consider* recommendations. Having considered them (unfav-

ently no matter how), it is for petitioners alone to decide, without supervision from the court, whether they will deign to comply or whether they will take significant action to implement their solemn promises in the consent order. This is a modern edition of the Roman waywardness which prompted the retort "*Sit pro ratione voluntas.*"

(c) Petitioners are apparently outraged by any judicial activity which questions their activities. (Petition for Certiorari, pp. 6, 12-13, 18-21, 32) The underlying complaints showed that industrial democracy was and is impossible while callous wrongdoers are tolerated in office. By requiring obedience to the Union Constitution in all matters consistent with the principles of equity and the objectives of the consent order, the latter requires petitioners as a matter of official duty to bring such wrongdoers to book.

Intra-union corruptioneers commonly and naturally avoid honest accounting procedures, often fail to perform their fiduciary duties and sedulously hide conflicts of interest. Such conduct was prohibited by Section 5 of the consent order. If the court is required to be the unprotesting observers of irregularities and crimes by corrupt union leaders where such misconduct strangles the very possibility of a fair election, the stage would be effectively set for a second rigged election and the barriers to a fair convention could not possibly be removed.

(d) Petitioners grossly misstate and vastly exaggerate the investigative powers of the district court. (Petition for Certiorari, pp. 10, 20-21) Certainly, the court has not embarked upon or threatened "a protracted, far-ranging investigation of virtually every facet of the affairs of the I. B. T. and its locals." The

investigation is limited to fulfillment of the obligations of petitioners under the consent order. It is their obligation to oust corrupt officials whose very presence endangers democracy and reputation within the International Organization. It is nothing short of a pathetic travesty that rank and file members and minor officials are regularly made to face charges and are eventually expelled or otherwise disciplined for peccadilloes, while petitioners or their influential friends commit with impunity conduct not permitted their subordinates. Exactly this unequal application of law had made their regime oppressive.

(e) Petitioners complain of the judicial modification of the election-eligibility rule. The latter was conceived at the rigged convention of 1957 (and is now sought to be applied) for the purpose of disfranchising members in good standing in the interest of perpetuation of petitioners' power. (Petition for Certiorari, pp. 29-30)

(f) Petitioners misconstrue *United States* v. *Swift*, 286 U.S. 106. (Petition pp. 24-27) They also misapply its valid principles to the facts in this case. It seems difficult to conceive of a decree which, more accurately than the consent order, is one of "those that involve the supervision of changing conduct and conditions and are thus provisional and tentative." 286 U.S. at 114. The starting point of their misapplication of the *Swift* case is their premise that "the right asserted by Respondents in this case was the right to a new convention to be conducted under the eye of the Court." (Petition for Certiorari, pp. 24-25) This over-simplification conveniently neglects the fact that most of the consent order's language is devoted to stipulations designed to eliminate the uncon-

stitutional conditions which prevented a fair election and convention at Miami Beach, Florida, and still prevents one and the correction of numerous financial abuses and other misdeeds.

The consent order exacts from petitioners fulfillment of the consent order and recognition of the rights which were "protected" under the principles of the *Sniff* case. The rights of respondents under the consent order were not constituted by a written declaration of right, subject to defeasance at will by petitioners. The right of respondents was to performance by petitioners. Petitioners' application of the *Sniff* doctrine to the facts in this case would give respondents the cold comfort of a judicially verbalized declaration sans performance or enforcement. This would defeat the basic objective of the consent order.

CONCLUSION

The consent order and its construction by the courts below will have little or no precedent value. Few if any unions have a record of official misfeasance and malfeasance as the International Organization and fewer would find it necessary to agree to a similar consent order.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Godfrey P. Schmidt
12 East 41st Street
New York 17, New York

Attorney for Respondents except John Cunningham

December 19, 1959

FILE COPY

FILE COPY

MOTION FILED OCT 19 1959

No. 415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JOHN F. ENGLISH, ET AL., *Petitioners*

v.

JOHN CUNNINGHAM, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

and

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND TO CORRECT OR AMEND THE CAPTION TO DESIGNATE OR CONFIRM THE BOARD OF MONITORS AS A PARTY RESPONDENT

MARTIN F. O'DONOGHUE
Chairman, Board of Monitors
831 Tower Building
Washington, D. C.

October 19, 1959

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IN THE

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v.

JOHN CUNNINGHAM, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR BOARD OF MONITORS IN OPPOSITION

This proceeding involves another facet of the legal campaign[1] to repudiate the obligations of Teamsters Union officials under the interim consent decree of January 31, 1958, which was designed to eliminate financial abuses and to ensure honest elections for the protection of the rank and file union members.

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[1] See, *e.g.*, *San Soucie* v. *Letts*, No. 194, O. T. 1959, *cert. denied*, 28 U.S.L. Week 3103 (Oct. 12, 1959); *Cunningham* v. *English*, No. 383, O. T. 1959; and *English* v. *Cunningham*, *application for stay denied*, (Aug. 4, 1959).

QUESTION PRESENTED

On February 9, 1959, the district court issued an order directing compliance by James R. Hoffa, Dave Beck, Frank Brewster and other Teamster officials with the provisions of the interim consent order entered by that court on January 31, 1958, and extended the term of the consent order to bring about their compliance with the primary obligations to manage union funds honestly and to conduct union elections fairly. Upon review, the court of appeals unanimously ruled that these union officers, having voluntarily assumed judicially enforcible obligations under the consent order, must comply with judicial orders implementing and enforcing those obligations. The court of appeals also affirmed the district court's enlargement of time as to their unfulfilled obligations under the consent order. The court declined, as had the district court, to adopt the argument that the February order in either respect departed from the terms of the consent order.

Rather than the sweeping controversy as to "judicial power of the court, under Article III of the Constitution" (Pet. 3) sought to be raised by the petitioners, and never urged in the courts below,[3] the sole question

[3] In any event, these sweeping "issues" framed by petitioners (Pet. 3) as to the existence and exercise of judicial power by the federal courts to redress rights asserted by members of a labor organization are totally without merit. For whenever a so-called "non-profit association" or its officers engage in "fraud, collusion or arbitrariness," as charged here (R. 5-6), that conduct is as directly amenable to judicial process as are the wrongful acts of business corporations. *Gonzales* v. *Roman Catholic Archbishop of Manila*, 280 U. S. 1, 16 (1929). See also *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 116 (1952); and compare *International Association of Machinists* v. *Gonzales*, 356 U. S. 617 (1958); *Sures* v. *Oil Workers International Union*, 350 U. S. 892 (1955). In most instances, state rather than federal courts will provide the forum

properly here is whether the unanimous decision of the court of appeals correctly affirmed (1) the specific orders of compliance issued by the district court pursuant to the consent order and (2) a time extension of that consent order by the district court entered after hearing and upon findings that the basic purposes of the consent order would otherwise be thwarted.

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for the redress of fraudulent activities by union officials by reason of diversity of citizenship requirements. See, *e.g.*, *Underwood* v. *Maloney*, 256 F. 2d 334 (3d Cir. 1958), *cert. denied*, 358 U. S. 864 (1958).

The bugaboo that this case portends a "constant stream of litigation looking toward similar relief" (Pet. 16) overlooks that "this international union voluntarily did unto itself what no union has done" or probably will ever do again unless to avoid a public trial on the merits. Statement of petitioners' counsel in *Hearings before the Senate Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong., 2d Sess. pt. 36, 13278 (1958). And having reaped the benefits of the consent order, such as their provisional installation in office, it all behooves Hoffa and the other petitioners to complain more than a year later about the district court's exercise of the jurisdiction it undoubtedly had and to which they agreed.

Petitioners' suggestion (Pet. 10-12) that their conduct is properly the subject of legislative, not judicial, inquiry is of a piece with their statement to a congressional committee that this same conduct was properly subject to judicial cognizance. *Hearings before the Senate Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong., 2d Sess. pt. 36, 13278-80 (1958). Somewhat more candidly they admit that the substantive provisions of the recent Labor-Management Reporting and Disclosure Act, resulting from the public disclosures of that committee, fall short of reaching the misconduct enjoined here. (Pet. 11.) Indeed, Section 103 of this new legislation expressly confirms the "rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization," while Section 101 (a) protects the membership's "right to sue" from union officers' pressure or hindrance. Pub. L. No. 257, Sept. 14, 1959.

STATEMENT

This controversy began with the filing of a complaint in the United States District Court for the District of Columbia by thirteen members of the Teamsters Union, who, on their own behalf and on behalf of all other union members and union locals, sued to enforce rights being denied them by Teamster officers, and resulted in the interim consent order establishing the Board of Monitors and charging these officers with certain "obligations judicially enforcible."[3]

The complaint, filed on September 19, 1957, charged those officials with numerous violations of the membership's rights, including a "conspiracy to rig or improperly influence the [election of officers] and to prearrange its outcome by fraud, deception or strategem, as well as by intimidation, coercion or threats," for the purpose of electing petitioner Hoffa as general president and petitioner Beck as general president emeritus. (Cplt. par. 40; R. 5-6) Other wrongful conduct detailed in the complaint included raids on union treasuries, misuses of union funds, refusals of financial accounting, maintenance of inadequate financial records and reprisals against any union member seeking redress of these illegal acts. (Cplt. par. 43; R. 6-10)

The basic relief of the complaint was the appointment of "a receiver or board of receivers" authorized to establish, under the district court's supervision and direction, honest and democratic election procedures and the elimination of the financial abuses specified in the complaint. (R. 27) After the court of appeals

[3] *English* v. *Cunningham*, Mr. Justice Frankfurter denying petitioners' application for stay, Slip Opinion at 2 (Aug. 4, 1959).

stayed an injunction enjoining the impending Teamster convention,[1] the plaintiffs amended their complaint to challenge the proceedings at the convention and to stay the effectiveness of any action taken there. The district court then issued a preliminary injunction restraining petitioner Hoffa and others from taking office.

After twenty-two days of trial publicly airing the misdeeds of various union officials, Hoffa and the other officers consented to the entry of an interim order on January 31, 1958, setting up the Board of Monitors[2] whose general function was "to insure the enforcement and protection of all rights of the individual members and the subordinate bodies" of the Teamsters.[3] (Consent Order par. 3; Pet. 40a) Simultaneously Hoffa and the other petitioners assumed a number of specific obligations with respect to election procedures and honest management of union funds. In return, petitioner Hoffa was permitted to assume office provisionally. The order provided that the Board of Monitors would continue to function for at least one year

[1] The Chief Justice, sitting as Circuit Justice, denied respondents' petition to vacate the stay.

[2] According to the court below, "No untoward legal significance attaches to the designation; and the court could use a board of this character to assist in bringing the litigation to a solution consistently with the rights and duties of the parties." (Pet. 15a)

[3] As detailed by the decision below, the Board of Monitors would "make recommendations * * * in areas where the defendants have substantive obligations under the consent decree. * * * If * * * defendants fail to comply in any significant respect with their obligations * * * the Monitors may so report to the court. * * * The court itself, after due opportunity for defendants to be heard, may issue orders within the scope of the consent decree." (Pet. 18a-19a)

and thereafter until a new convention was held. (Consent Order par. 8; Pet. 42a)

"Belying the spirit of compromise that surrounded the consent order's entry, petitioners began to engage in tactics designed to frustrate and defeat implementation of the consent order and then called a new convention for March 1959.[7] Faced with this recalcitration, the Board of Monitors, charged with implementation of the consent order, petitioned for the district court's aid to carry out the terms of the order. A seven-day trial in response to this petition was held in November 1958, and the district court, on February 9, 1959, entered its order here challenged."

In his ruling, the district judge, who had approved the consent order, highlighted the "failure of the Teamsters to cooperate and to accord good faith compliance with the orders of recommendation of the Monitors to achieve the basic purposes of the consent order" thereby "occasion[ing] loss of valuable time." (Pet. 6a) To effectuate the basic purposes of the consent order, the judge extended the time for compliance with the obligations Hoffa and the other petitioners had voluntarily assumed.[8] In addition, the court directed the union officers to comply with certain specific recommendations, such as auditing the books of Local No. 295 and reinstatement of union members wrongfully declared ineligible to run for union office. (Pet.

[7] Although the district court found petitioners to have acted in bad faith (Pet. 3a-4a, 6a), the court of appeals did not deem it necessary to base any part of its decision on this finding. (Pet. 18a)

[8] As revised, the consent order provides that a new convention may be held at any time after February 9, 1960, subject to approval of the district court.

28a-29a, 37a) each directive being "reasonable and relevant to the basic purposes of the consent order." (Pet. 5a)

Petitioners appealed, narrowly challenging the February order as an (1) "Erroneous and Unwarranted Construction of the Consent Decree," (2) as an "Invalid Modification of the Consent Decree" and (3) as being "Unsupported by the Record."[9] (Pet. Br. in Ct. App. 20, 37, 63)[10].

As to the time extension, the court of appeals, after acknowledging the consent order as a proper vehicle for redressing the wrongs alleged, unanimously concluded that "[t]he consent decree clearly contemplated change which would lead toward new and valid elections. If this basic goal of the parties could not be reached in the time originally contemplated, an extension of time could validly be made by the court under the *Swift* principles." (Pet. 20a) The court stressed that "[i]f [petitioners'] obligations are not yet fulfilled we think the time for doing so may be enlarged." (Pet. 21a)

Further, the court found that the specific court directives, requiring such things as audits of union locals' financial records, investigations of fund misuse and suspension of local officers pending such investigations, were contemplated by the Teamster officials' consent

[9] Compare these issues with petitioners' "Questions Presented" here. (Pet. 2-3)

[10] Among other things, the court of appeals set aside that part of the February order interdicting good faith compliance with all future orders that were reasonable and relevant to the consent order's basic purposes. (Pet. 22a-23a) The issue of Monitor Schmidt's conflict of interest was remanded for consideration by the district court. (Pet. 24a-26a)

and were necessitated by the evidence adduced at the November hearing.[11] In this connection, the court of appeals declared that the several directives were "instructions or interpretations, rather than modifications. Each of those we have sustained finds its basis in the terms of the consent decree itself." (Pet. 38a)

Petitioners' application for a stay of the order of enforcement was denied by the court of appeals as well as by Mr. Justice Frankfurter as acting Circuit Justice.

Having raised no challenge in either the district court or the court of appeals to the order to which they voluntarily consented and whose benefits they have enjoyed by "immediate installation in office" (Pet. 17), for the first time in this Court petitioners press sweeping constitutional issues of "judicial self-restraint," "judicial power" and "judicial interference." (Pet. 3, 9) Significantly, the court of appeals fixed the bounds of their legal challenge,[12]

> "The plan consented to for the solution of the issues was within the competence of the court to approve, and *neither* [*petitioners*] *nor* [*respondents*] *urge the contrary.*" (Pet. 15a) (Emphasis added)

[11] Judgment, deferred to allow the parties to reach an agreement as to form or to seek clarification, was entered on July 9, 1959. (Pet. 50a)

[12] At one time these union officers strenuously defended their consent order in the face of a procedural attack by John Cunningham, one of the original plaintiffs. (Pet. 34 n. 15). It would now appear that they have become disenchanted with that stand also, for while "still believ[ing] the consent decree is immune to [Cunningham's] attack, it is their position that the ground upon which the court below reached that conclusion * * * is untenable." Memorandum for Respondents at 7, *Cunningham* v. *English*, No. 383, O. T. 1959.

And in denying petitioners' stay application, Mr. Justice Frankfurter demarcated the scope of their challenge to the district court's interpretive order as follows:

> "The legal issue growing out of this voluntary restriction of defendants' action is the validity of specific recommendations by the Board of Monitors as judicially defined and approved. * * * According to the Court of Appeals, these judicial commands upon the defendants are merely enforcement of the obligations which they undertook by the consent decree and are not one-sided modifications of it. *This is the controversy to be raised by the petition for certiorari which the defendants plan to file.*" Slip Opinion at 3. (Emphasis added.)

ARGUMENT

As will be detailed, the unanimous affirmance by the court of appeals of the district court's implementation of the consent order does no more than hold Hoffa and the other union officials to the obligations they voluntarily assumed in order to obtain their provisional installation in office and to preclude any likelihood of an adverse decision on the merits. Additionally, the ruling below properly sustained an extension of time to effectuate the basic purposes of the decree in the face of obstructive conduct. That ruling did not in any way alter the substantive obligations assumed by petitioners, but rather provided the procedural means whereby they could be realized. Judicial "housekeeping" of this nature by the decree court, as affirmed by the court of appeals, presents no general issues of public importance meriting review by this Court.

1. *The Decision Below Properly Enforces the Substantive Obligations Petitioners Voluntarily Assumed Under the Consent Order.*

The specific directives by the district court enforcing the substantive obligations Hoffa and the other petitioners voluntarily assumed, as affirmed by the court of appeals, are unquestionably within the scope of the consent order, which they acknowledge as a "broad compromise serving the interests of both sides." (Pet. 17)[13]

At a time of intensive public scrutiny of malfeasances on the part of union officials, Hoffa and the other Teamster officers, with the district court's approval, accepted the consent order and its substantive obligations in lieu of an adjudication on the merits. Basically, under that consent, these officials assumed protection of the union membership's right to constitutional procedures, including such fundamentals as democratic elections, establishment of sound financial and accounting procedures, honest management of union funds and the absence of conflict of interest on the part of union officers.

Since the consent order carefully spells out the membership's "right to vote" in "honest advertised elections" and specifically requires petitioners, among other things, to "establish accounting and financial methods, procedures and controls affecting all funds" which are to be handled according to "recognized legal and equitable standards and obligations imposed

[13] Since the two courts below were correct on this aspect of the case, the greater part of petitioners' argument is academic because it assumes "modifications" of the consent order were made. (Pet. 22-36)

upon fiduciaries" (Consent Order par. 3, 5; Pet. 40a-41a), the decision below affirmed the decree court's implementation of those basic designs by ordering such things as audits of the financial records of locals where misappropriation of funds was evident.[11] (See *supra* at 6-7)

Clearly the court of appeals was warranted in interpreting the consent order to require compliance by these union officials with the obligations they voluntarily assumed. As explained by that court, the specific directives approved are "instructions or interpretations, rather than modifications," each finding "its basis in the terms of the consent decree itself." (Pet. 38a) No more is required than such a fair and sensible application of the language of the consent order. *United States* v. *Atlantic Refining Co.*, 360 U. S. 19, 23-24 (1959). And as petitioners recognized, "this Court will not ordinarily exercise its certiorari jurisdiction to inquire into the propriety of a lower court's construction of a decree." (Pet. 16)

Actually, petitioners' argument here is a transparent effort to repudiate their consent to the January order in the guise of challenging its implementation. Indeed, given the plain and evident purpose of the consent order, petitioners' argument is incredible, for in their

[11] "We do not turn aside to inquire whether some of these restraints * * * could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court. * * * Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall." *United States* v. *Swift & Co.*, 286 U. S. 106, 116-117, 119 (1932).

view, insofar as enforcement and compliance are concerned, the order left "ultimate discretion in petitioners." (Pet. 26) Essentially, Hoffa and the other petitioners would like to be able to "voluntarily submit * * * to a judgment of a court one day and flout it with impunity the next when its application proves more distasteful than [they] had anticipated." *National Labor Relations Board* v. *Retail Clerks International Ass'n*, 203 F. 2d 165, 169 (9th Cir. 1953). But above all, their consent cannot be so voided in the absence of a showing of "lack of actual consent * * * fraud in its procurement * * * or * * * lack of federal jurisdiction."[15] *Swift & Co.* v. *United States*, 276 U. S. 311, 324 (1928).

II. The Decision Below Correctly Affirmed the Trial Court's Time Extension to Preclude Obstruction of the Consent Order.

In the context of this case, the court of appeals properly sustained the trial court's one-year conditional extension of the consent order to prevent obstructive conduct from thwarting effectuation of the order's basic purposes.[16]

[15] Petitioners' allusion (Pet. 13-14) that jurisdiction over local officers may be lacking ignores the raison d'être of class suits—the impracticability of personally joining some 1,600,000 persons. *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356 (1921). "If the Federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree, when rendered, must bind all of the class properly represented." *Id.* at 367.

[16] Petitioners' simulated concern with the impact of this case on consent decrees in the field of antitrust (Pet. 9, 23) is to be contrasted with their argument to the court below that "[t]his consent decree is not like a decree entered in an antitrust case to protect competition, where constantly changing economic conditions and relationships may require adjustments of the decree to ac-

As already detailed (*supra* at 5-6), the obligations voluntarily assumed under the consent order were to be operative for "at least one year and thereafter until a new convention [was] held," at which time the Board of Monitors also would cease functioning. (Consent Order par. 8; Pet. 42a) After frustrating and blocking implementation of the consent order for almost one year (See Pet. 4a), the petitioners then called a new convention "to rid themselves of the monitorship." (Pet. 17-18) Finding that this evasive conduct "occasioned loss of valuable time" and that the "very essence of the consideration upon which the time element rested ha[d] been completely destroyed" (Pet. 6a), the district court revised the consent order to provide that the next convention may be held at any time after February 9, 1960, some four months hence, subject to the court's approval. The court of appeals in unanimously upholding the trial court's action also concluded that "[i]f [petitioners'] obligations are not yet fulfilled we think the time for doing so may be enlarged." (Pet. 21a)

The decree court's time extension, conditioned upon good faith compliance, is well within conventional principles of equity for enforcing and carrying into effect judicial decrees as the exigencies of the particular

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complish its purpose." (Pet. Br. in Ct. App. 39) Nor can antitrust decrees be flouted or obstructed with impunity. See *United States* v. *Schine*, 260 F. 2d 552 (2d Cir. 1958), *cert. denied*, 358 U. S. 934 (1959). Furthermore, antitrust consent decrees must abide an especial public interest in vigilant enforcement, whether negotiated by the federal government, *Missouri-Kansas Pipe Line Co* v. *United States*, 312 U. S. 502, 506 (1941), or by private persons. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955).

case may require.[17] Here unilateral obstruction by one party created the need for additional time to implement the judicially approved objectives of the consent decree. Even non-consensual modifications that go to the substance of obligations assumed after years of litigation are permissible in appropriate circumstances, for a "continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932).[18]

The argument pressed by Hoffa and the other petitioners that a contempt proceeding was the only remedy in these circumstances (Pet. 26) would sanction abuse of judicial process and place a premium on the flouting of legal orders. The fact is that petitioner Hoffa and the other officers were warned of the consequences that would attach if future court orders were "violated, disregarded or ignored." (Pet. 7a) In any event, their inequitable conduct should stand as a bar

[17] Petitioners argue erroneously that "the single issue presented in the case was whether the 1957 I. B. T. convention should be invalidated" (Pet. 12, 14-15) and conclude from this faulty premise that the "right to have a new convention * * * was fully accrued," not admitting of revision in any circumstances. (Pet. 24-25) Only by distorting the complaint, and the consent order as well, can they so easily slough off the numerous non-election violations alleged in the complaint (R. 5-6) and the detailed non-election obligations voluntarily assumed in the consent order. (Consent Order pars. 5-7; Pet. 40a-42a)

[18] Petitioners properly concede (Pet. 26) that provisions expressly retaining jurisdiction are not prerequisite to appropriate modifications. See *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932).

to any attempt to renege on a judicially approved bargain.[29]

Where, as here, the decree court after hearing[30] finds that the basic objectives of the consent order require an extension of time because of the opposing party's unilateral obstructions and the court of appeals, upon review affirms, no special or important reasons for certiorari review have been shown.

CONCLUSION

The decision of the court of appeals is amply supported by the record which depicts the trial court's efforts to bring this proceeding to an expeditious close in the face of the petitioners' obstructive conduct. The specific directives of compliance and the time extension turn on the facts as found by the trial judge and affirmed on appeal. These particulars generate no principles of wide application deserving review by this Court. Accordingly, the petition should be denied.

Respectfully submitted,

MARTIN F. O'DONOGHUE
Chairman, Board of Monitors
831 Tower Building
Washington, D. C.

October 19, 1959

[29] Petitioners' post-decree conduct gives fresh currency to the maxim "he who comes into equity must come with clean hands." Cf. *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806 (1945), "This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Id.* at 814.

[30] See *Hughes* v. *United States*, 342 U. S. 353, 357-358 (1952).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

JOHN F. ENGLISH, ET AL., *Petitioners*

v.

JOHN CUNNINGHAM, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND TO CORRECT OR AMEND THE CAPTION TO DESIGNATE OR CONFIRM THE BOARD OF MONITORS AS A PARTY RESPONDENT

The Board of Monitors hereby moves the Court for leave to file the foregoing brief in opposition to the petition for certiorari in this case and to correct or amend the caption to designate or confirm the Board as a party respondent. As grounds for this motion, the Board states as follows:

History of the Proceeding[1]

This proceeding, instituted by rank and file members of the Teamsters Union on September 19, 1957, to obtain democratic elections and honest fund management led to the entry of an interim consent order on January 31, 1958, establishing the Board of Monitors as officers of the court charged with implementation of the obligations voluntarily assumed by petitioners under that order.

To halt petitioners' efforts to defeat enforcement of the consent order, the Board petitioned the district court in September of 1958 for an order enforcing their obligations and extending the time for compliance.

On February 9, 1959, after seven days of trial, the district court, having found that petitioners had thwarted implementation of the consent order, directed them to comply with the order in several respects and extended the term of the consent order. Petitioners appealed.

The Proceeding Below

Upon review the court of appeals affirmed the February order in all significant respects, withholding judgment in order to afford opportunity for "the parties and the Monitors to agree if possible upon a form of judgment which is consistent with our opinion." (Pet. 38a)[2] After "the plaintiffs, the de-

[1] The Board's opposition sets forth in greater detail the relevant facts which are only broadly summarized here. (Opp. 4-9)

[2] In its opinion, the court interpolated that the Board of Monitors, being neither plaintiff nor defendant in the district court but court-appointed officers, was not technically a party to the proceeding. (Pet. 16a, n. 9) Undoubtedly the reason for this statement was that all orders have been entered as a part of the orig

fendants, and the Monitors [had] agreed upon a form of proposed judgment," judgment was so entered. (Pet. 50a) The Board, at whose instance the February order was issued, had filed briefs and participated fully in oral argument.[3]

The Board of Monitors Is Entitled to Participate in This Court

Having participated in the two appeals from the February order and all proceedings to date in this Court, the Board of Monitors is clearly entitled to participate further in this proceeding.[4] This is particularly true because the order being challenged here was responsive to the Board's petition for enforcement and modification. Hence, only by allowing the Board to participate fully as a party respondent will this Court receive the independent view of the Monitors

inal docket in the district court and thus all orders have borne the caption of the original case. *Cunningham* v. *English*, Civil Action No. 2361-57.

[3] The Board of Monitors also opposed petitioners' application for stay in this Court and participated in oral argument before Mr. Justice Frankfurter. Similarly the Board fully participated in John Cunningham's appeal from the February order. *Cunningham* v. *English*, No. 15033 (D. C. Cir. June 10, 1959). (Pet. 63a) In fact, counsel for petitioners has acknowledged "the Monitors are entitled to be heard in the Court of Appeals as officers of the District Court. And in that connection their views may be heard by the Court of Appeals." *Cunningham* v. *English*, Civil Action No. 2361-57 (D. D. C. Aug. 13, 1959) (transcript of proceedings before Judge Hart on application for stay of appointment of law firm, pp. 41-42).

[4] Certainly the determination of who is a party does not depend upon the discretion, election or tactical consideration of the party seeking review. Cf. *National Hells Canyon Ass'n.* v. *Federal Power Commission*, No. 773, O. T. 1956 (Order of March 4, 1957). Nor can the petitioner foreclose participation by simply omitting a party from the caption of the case.

who have participated since the inception of this phase of the litigation, in accordance with their court-appointed function "to insure the enforcement and protection of all rights of the individual members and the subordinate bodies" of the Teamsters. (Consent Order par. 3; Pet. 40a)

Accordingly, the Court is requested to enter an order granting leave for the Board of Monitors to file their brief in opposition to the petition for certiorari, and to correct or amend the caption of the case to designate or confirm the Board of Monitors as a party respondent with right of full participation and to grant such other relief as may be just and equitable.

Respectfully submitted,

MARTIN F. O'DONOGHUE
Chairman, Board of Monitors

OCTOBER 19, 1959

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JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM, 1959

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On Application for Stay

OPPOSITION OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

JOHN F. ENGLISH, ET AL., *Petitioners*

v.

JOHN CUNNINGHAM, ET AL., *Respondents*

On Application for Stay

OPPOSITION OF RESPONDENTS

Having failed to convince either the court of appeals or Mr. Justice Frankfurter that the salutary directives of the instant judgment could have the effect of wreaking irreparable injury upon them, petitioners' burden before this Court is a heavy one.

Their clear recognition of the nature of this burden is evidenced by the stark contrast between the sweeping allegations of prospective chaos which permeate

their application for stay, and the narrow, remedial directives of the judgment sought to be stayed, which lie buried and unindexed in the 103 page petition for certiorari and appendix filed in this cause.

Even a cursory analysis of the judgment stamps it as irreconcilable with the dire consequences of irreparable injury which it would allegedly generate.[1]

I.

Petitioners' present application carries the same legal infirmity as its predecessors. Specifically, having failed to demonstrate how the judgment they seek to stay can cause them irreparable injury, they again "seek to enlarge the significance of the immediate items in controversy by their anticipation of an expansion of the powers of the Board of Monitors and their resulting fear of disruption of forces within the Teamsters as well as a heavy drain on the Teamsters' treasury."[2]

This facile attempt to inject the indispensable element of irreparable injury into the case has been clearly rejected by Mr. Justice Frankfurter, who found such allegations to have reference, not to the

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[1] Petitioners' leisurely pace in prosecuting the instant application for stay is hardly compatible with any great concern about irreparable injury. The judgment sought to be stayed was entered on July 9, 1959. Mr. Justice Frankfurter denied a stay on August 4, 1959. The present application was not filed until September 18, 1959, over one month after the denial by Mr. Justice Frankfurter and over two months after the entry of judgment.

[2] *English* v. *Cunningham*, On Application for Stay before Justice Frankfurter, Order of August 4, 1959 at 4.

judgment, but to "matters not immediately involved in the decree of the Court of Appeals . . ."[3]

Thus, the narrow issue before the Court on this application is whether the implementation of the judgment entered by the court of appeals on July 9, 1959, presents such "a clear case and a decided balance of convenience" so as to provide "very urgent reasons" to overrule the deliberate actions of the court below and Mr. Justice Frankfurter in denying a stay. *Magnum Import Co. v. Coty*, 262 U. S. 159, 164 (1923).

II.

That the judgment sought to be stayed can not result in irreparable injury to petitioners is graphically demonstrable by a seriatim consideration of its provisions.

Insofar as paragraph 1(b),[4] 1(c),[5] 1(g),[6] are concerned, the fact is that petitioners have already agreed to them in all material respects.

Paragraph 1(a) seeks a hearing looking to a trusteeship of a local union. A fair hearing on this cannot prejudice petitioners.

Paragraphs 1(e), 1(f) and 1(h) deal with charges against local union officials. Compliance has been accomplished in some material respects. Moreover, holding hearings to ascertain the truth of allegations

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[3] *Id.* at 4.

[4] Letter of James R. Hoffa to business representative of Local 245, August 5, 1959.

[5] Letter of James R. Hoffa to Secretary-Treasurer of Local 808, August 5, 1959.

[6] J.A. 501.

charging officials with misusing union funds cannot cause petitioners irreparable injury.

Paragraph 1(d) provided merely for discussion of a Price-Waterhouse & Co. Report which has already been initiated.

Paragraph 1(i) similarly provided for discussions between petitioners and the Board of Monitors. Initiated in 1958, these discussions have continued up to the past week. Mr. Hoffa has agreed to temporary rules proposed by the Monitors and has sent them to local union.

Paragraph 2 of the judgment merely provides for consultation to seek a remedy concerning the merger of two locals. Any subsequent order on this merger may be appealed by petitioners if they are aggrieved.

Paragraph 3 merely states that petitioners assist the Monitors in accomplishing the purposes of the Consent Order.

Paragraph 4 of the judgment extends the terms of the Consent Order until at least February 9, 1960. Having consented to the original Order it strains imagination that its continuance for four more months, or even longer, could cause irreparable harm.

Paragraphs 5, 6 and 7 are moot; paragraph 8 has been complied with; and paragraph 9 merely vacated certain provisions of the decree of the district court.

Paragraph 10 merely reflects Section 401(e) of the *Labor-Management Reporting and Disclosure Act of 1959* (Publ. L. 86-257, 86th Cong., 1st Sess.) which provides:

> "No member whose dues have been withheld by his employer for payment to such (labor) organi-

> zation pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues."

The balance of paragraph 10 prevents disqualification of potential candidates who could not comply with the amended Constitution because of the lack of proper notice.

In sum, a substantial part of the judgment is moot, has been complied with, merely provides discussion or requires further action by the district court. The balance of the judgment cannot conceivably cause petitioners irreparable harm.

III.

Petitioners have little standing to complain about any inhibition of the rights of members of the Teamsters Union to effect self-government. As the record amply supports, it was petitioners' very lack of concern for these rights which gave rise to the Consent Order. The entire thrust of that Order, and its construction by the court of appeals, is to protect these rights of Union members against their wholesale and continual infringement by these very petitioners.

Equally without substance is petitioners' contention that they have been denied the right to govern the Union as its elected officers. The Monitors are not trustees or receivers of the Union, nor do they have jurisdiction over collective bargaining and collateral matters. In the limited area where they have jurisdiction (matters related to petitioners' obligations under the decree), the Monitors' powers, as found by the

Court of Appeals, are merely advisory. Thus, the petitioners remain the *de facto* officers of the Union, and to the extent that the Monitors and the district court might inhibit their prerogatives as officers, such restriction flows from the voluntary acceptance of specific obligations by petitioners in exchange for their *de facto*, but provisional, tenure.

The alleged "ever increasing strain upon funds" occasioned by the monitorship, besides not being a factor of significance upon consideration of the grant of a stay, *Virginia Ry. Company* v. *United States*, 272 U. S. 658 (1925); *Virginia Petroleum Ass'n.* v. *FPC*, 259 F. 2d 929 (D. C. Cir. 1958), is also a voluntarily assumed obligation with the salutary objective of creating conditions which benefit the rank and file and the free exercise of their rights.[7]

The balance of the dire predictions of the petitioners[8] are either palpable distortions or serve to emphasize the very reasons why the judgment should be implemented, not stayed.

In the former category, the ominous suggestions of dissension and resentment among the local unions which allegedly portend the imminent disruption of the International are difficult to reconcile with the tenacity and vitality with which petitioners have resisted compliance with their obligations.

[7] Moreover, reflecting its proper concern over the expenditure of Teamster funds, the Court of Appeals has stayed the effectiveness of the order authorizing the employment of additional lawyers by the Monitors.

[8] Which respondents emphasize stem from matters not immediately involved in the decree sought to be stayed.

Conversely, respondents submit that under the Consent Order the progressive exposure of union officials who violate the constitutional rights of the membership are results upon which this Court should view with favor and encourage, not impede.

CONCLUSION

The judgment sought to be stayed carries no potential for irreparable injury to the petitioners. Insofar as it may restrict their actions as provisional officers of the union, such effect flows from their voluntarily assumed obligations with respect to the rights of the membership in exchange for which they have been permitted to hold office.

A stay of the judgment would have the effect of prolonging the oppressive conditions which caused the rank and file membership to seek legal redress for the wholesale infringement of their rights.

Thus, respondents, still seriously aggrieved, would continue to be oppressed by petitioners' failure to fulfill the bargain to which they agreed and for which respondents made concessions.[9]

Moreover, the public interest,[10] would be ill-served by the continuing bad faith refusal of petitioners to

[9] The provisional officers of the Teamsters have been seated for almost 2 years. Yet respondents must still fight bitterly to ensure compliance with the obligation upon which depend petitioners' provisional tenure. To frustrate the efforts to secure compliance at this time would make a mockery of the consent order which allowed petitioners to assume office.

[10] A proper element of consideration in the grant or denial of a stay. *Yakus* v. *United States*, 321 U. S. 414 (1943).

recognize the fundamental rights of the membership of the largest International Union in the nation.

WHEREFORE, the application for stay should be denied.

Respectfully submitted,

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October 19, 1959

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FILED
OCT 22 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

JOHN F. ENGLISH, ET AL., *Petitioners*

v.

JOHN CUNNINGHAM, ET AL., *Respondent*

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS AND BOARD OF MONITORS IN OPPOSITION TO PETITION FOR CERTIORARI

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PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS AND BOARD OF MONITORS[1] IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners' purpose, in this reply brief, is not to add to the lengthy argument contained in the petition, but only to bring to the attention of the Court several points of error or misstatement in the briefs of respondents and the Board of Monitors.

I

The Board of Monitors seeks to make some point of petitioners' alleged failure to raise in the courts below the questions of judicial power which are here presented. M. Br., pp. 2, 7, 8.

[1] The respondents' brief is hereinafter referred to as "R. Br." and the Board of Monitors' brief as "M. Br."

The issue in the District Court, as the respondents and the Board of Monitors well know, was whether the powers of the Monitors were mandatory or merely advisory and recommendatory. The respondents now say that "the Monitors never claimed nor exercised mandatory (as distinguished from recommendatory) powers." R. Br., pp. 3-4. Yet, the Monitors issued to the petitioners a whole galaxy of "orders of recommendation" and the Monitors' "Petition for Construction, etc." from which this case arose, stated, in framing the issue:

> "The status and authority of the Board of Monitors has been questioned by the Defendant International Brotherhood on the basis that the powers of the Monitors are merely advisory and recommendatory." R. 64.

The District Court's opinion, in resolving this issue, stated:

> "The Court does not subscribe to the view that the duties and privileges of the Monitors were merely advisory." R. 167.

That court further said:

> "Now that the views of the Court respecting many matters in dispute are known the Court will expect prompt compliance with such orders of recommendation which have been made and such reasonable orders of recommendation as may be made by the Monitors. . . ." R. 170.

In its eleventh conclusion of law, the District Court stated:

> "The Court concludes, as a matter of law, under the Consent Decree that the duties and respon-

> sibility of the Monitors are not merely advisory or recommendatory, that the Defendant provisional officers are to comply with all orders of recommendation of the Board of Monitors which are reasonable and relevant to the purposes of the Consent Decree. . . ." R. 275-76.

When the District Court's action was appealed to the Court of Appeals, petitioners fully briefed the question whether the Consent Decree gave the Monitors authority to issue orders rather than to give advice or make recommendations. Not until they received that brief did the respondents and the Monitors concede that they had been wrong. It was this concession that permitted the Court of Appeals to say that "both the plaintiffs [the respondents here] and the Monitors concede that the Monitors cannot command." Petition, p. 18a.

The Court of Appeals thereupon sustained petitioners' position, but, for the first time, introduced the questions of judicial power presented in the instant petition. The Court of Appeals held:

> "That they [the Monitors] do not have the power to command, as they and the plaintiffs now concede, is clear from the terms of the consent decree. . . . But it is equally clear that that decree imposes definite obligations upon the defendants. . . . If the Monitors are advised that defendants fail to comply in any significant respect with their obligations under the consent decree, the Monitors may so report to the court. . . . The court itself, after due opportunity for defendants to be heard, may issue orders within the scope of the consent decree. . . ." *Id.*, pp. 18a-19a.

Thus, for the first time, was the consent decree construed as a grant of jurisdiction to the District Court

to conduct, through its officers, a kind of legislative inquiry into the affairs of the International and its subordinate bodies for the purpose of framing controversies for subsequent hearing and determination.

The petitioners, confronted with this new theory of the case, took their first and only opportunity to bring to the attention of the court below the questions of judicial power which are here presented. This they did in a timely motion for reconsideration filed in the Court of Appeals. R. 772 at 777-78.

It is submitted, therefore, that any suggestion by the Board of Monitors that the petitioners are precluded from raising before this Court the issues presented in the instant petition (if that is what the Monitors suggest in their brief) is not well taken.

II

The petition herein contends, on the basis of reason and the authority of *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F. 2d 316, 319-20 (3rd Cir. 1944), *cert. denied*, 325 U.S. 867 (1945), that the judicial power is limited to deciding controversies presented by the parties. The petition points out that the relief sought by the complaint in this action was the invalidation of the 1957 convention and the appointment by the court of officers to supervise the selection of delegates to a new convention and the balloting at such convention, so that no controversy was presented requiring, by way of resolution, the board legislative inquiry into the affairs of the 900 locals which the Court of Appeals has authorized. Petition, pp. 12-13.

Without undertaking to answer petitioners' contention in their respective arguments, both the respondents

and the Board of Monitors seek to undermine the contention by representing to this Court, in their respective statements of the facts, that the complaint had sought the appointment of receivers to undertake a general housecleaning of the International. R.Br., p. 2; M.Br., p. 4. These representations are simply *not true*. Respondents cite no record reference. The record reference cited by the Monitors (R.27) is the prayer for relief in the complaint. That prayer speaks for itself.

III

In an evident attempt to prejudice petitioners' case in the eyes of this Court, the Monitors engage in an unseemly half-truth about the District Court's finding that the petitioners were guilty of bad faith. They say in a footnote that "the court of appeals did not deem it necessary to base any part of its decision on this finding." M.B., p. 6, n. 7. The obvious implication of this statement is that the Court of Appeals may have approved the finding.

There is no suggestion in the statement that the findings of the District Court were subjected to intense attack by the petitioners as being without evidentiary support (R. 177) and that the Court of Appeals, taking cognizance of the attack, specifically refrained from approving the bad faith finding. The Court of Appeals said:

> ". . . The defendants dispute the findings of bad faith, claiming good faith differences of opinion about both the methods and powers of the Monitors, as well as the unsoundness of some of the Orders of Recommendation on constitutional and other grounds.

> "We think it unnecessary to resolve the question of bad faith or to pass upon the accuracy of the 129 findings of fact, some quite lengthy, submitted by the Monitors and adopted without change by the court. Otherwise we would be obliged to analyze and pass judgment upon each disputed charge and finding. We are able to determine the issues on appeal upon considerations other than the issue of bad faith, and aside from the accuracy of all but a few of the findings." Petition, pp. 17a-18a.

The force of the court's observation that the voluminous findings submitted by the Monitors were adopted without a single change, despite petitioners' objections, is enhanced by the fact that the court knew from petitioners' brief that one of the proposed findings (Finding No. 18, R. 216) referred to an alleged attempt by an officer of one of the local unions "to bribe an official of Horn & Hardart Company", that petitioners had called the District Court's attention to the obvious reversal of the parties to the alleged bribe (R. 183), and that the finding was nevertheless adopted as proposed.

CONCLUSION

Petitioners believe that the reasons for granting their petition remain undisturbed, if, indeed, they are even challenged, by any of the contentions advanced in opposition.

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FILED
OCT 22 1959
JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM, 1959

No. 415

JOHN F. ENGLISH, Individually and as General Secretary-Treasurer of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, DAVE BECK, DANIEL J. MURPHY, JOHN F. CONLIN, SIDNEY L. BRENNAN, JOHN T. O'BRIEN, FRANK BREWSTER, WILLIAM A. LEE, JOSEPH DIVINY, JAMES R. HOFFA, EINAR MOHN, HARRY TEVIS, HAROLD J. GIBBONS, GORDON R. CONKLIN, GEORGE R. MOCK, JOHN J. O'ROURKE, THOMAS E. FLYNN, OWEN BRENNAN, JOHN J. BACKHUS, MURRAY W. MILLER, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners*

v.

JOHN CUNNINGHAM, THOMAS G. MANNING, FRANK KENNEDY, ANDREW BOGGIA, GEORGE BECKER, JOSEPH MOLLOY, JOHN McMANUS, HAROLD WILL, STEVE MILONE, JOHN McGLYNN, EDWARD McFARLAND, JOHN OLSEN, and HOBART GALE, *Respondents*

OPPOSITION TO MOTION OF ANTHONY J. DISTINTI, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 277, I.B.T.; ROBERT J. COAR, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 701, I.B.T.; AND WILLIAM J. McKERNAN, INDIVIDUALLY AND AS SECRETARY-TREASURER OF LOCAL 617, I.B.T., FOR LEAVE TO FILE BRIEF AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

JOHN F. ENGLISH, ET AL., *Petitioners*

v.

JOHN CUNNINGHAM, ET AL., *Respondents*

RESPONDENTS' (except Cunningham) BRIEF IN OPPOSITION TO MOTION OF ANTHONY J. DISTINTI, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 277, I.B.T.; ROBERT J. COAR, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 701, I.B.T.; AND WILLIAM J. McKERNAN, INDIVIDUALLY AND AS SECRETARY-TREASURER OF LOCAL 617, I.B.T., FOR LEAVE TO FILE BRIEF AMICI CURIAE

RESPONDENTS oppose said motion because—

1. There is no need for a Brief Amici Curiae such as Movants request, since the named parties and the Monitors adequately and competently represent all conflicting interests.

2. The record makes it clear that in all their maneuvers below Movants have not acted in good faith. Although they pretend to stand apart, their conduct and their attempted interventions demonstrate that they are really acting on behalf of Petitioners (whether

with or without the latters' encouragement is unimportant). They make precisely the same arguments as Petitioners; (except in one respect noted infra). They raise the same actual and spurious issues (with one exception, infra). They seek the same ends as do Petitioners (with one exception).

The single exception concerns an issue which Petitioners, in view of their original formal approval of the Consent Order of January 31, 1958, could not in good faith or in logic seriously press: the invalidity of the said Consent Order.

3. Movants, as the record shows, have originally worked with and have adopted the discredited theories of the former plaintiff, John Cunningham, who has since April, 1958, defected to the cause of Petitioners.

4. Movants make no argument which is not already pressed by Petitioners and the said John Cunningham who have both petitioned for certiorari in this controversy (No. 415 and No. 383, respectively).

5. Movants have been guilty of laches in initiating the legal proceedings to which they lend their names.

6. Movants by their own application exhibit its lack of merit in law and in fact. (See Monitors' brief in opposition to certiorari in No. 383).

Respectfully submitted,

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PETITIONER'S BRIEF IN OPPOSITION TO MOTION OF BOARD OF MONITORS TO CORRECT OR AMEND THE CAPTION TO DESIGNATE OR CONFIRM THE BOARD OF MONITORS AS A PARTY RESPONDENT

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PETITIONER'S BRIEF IN OPPOSITION TO MOTION OF BOARD OF MONITORS TO CORRECT OR AMEND THE CAPTION TO DESIGNATE OR CONFIRM THE BOARD OF MONITORS AS A PARTY RESPONDENT

On October 19, 1959, the Board of Monitors moved for leave to file their brief in opposition to the petition for certiorari herein. Petitioners do not oppose so much of the motion as requests such leave.

The motion also requests, however, that the Court "correct or amend the caption to designate or confirm the Board as a party respondent." That part of the motion is hereby opposed by the petitioners. As grounds for such opposition, the petitioners state:

1. The whole burden of the Monitors' motion is contained in the statement in their motion that

> "Having participated in the two appeals from the February order and all proceedings to date in this Court, the Board of Monitors is clearly entitled to participate further in this proceeding."

Since petitioners do not oppose the filing of the Monitors' brief in opposition to the petition for certiorari, it is difficult to see what more the Monitors can seek by way of participation. As they themselves point out, they have always been permitted to file papers and to be heard at every stage of this litigation where their point of view was involved. It has, however, never been necessary for them to be formally designated as parties. The Monitors say that "only by allowing the Board to participate fully *as a party respondent* will this Court receive the independent view of the Monitors. . ." (Emphasis supplied.) There is not a word in the motion to lend any meaning to this *non sequitur*.

2. The Monitors must presumably grant, since they purport to represent an "independent" view, that it is at least conceivable that their position, which has thus far coincided with that of the plaintiffs (the respondents herein), may, from time to time, coincide with that of the defendants (the petitioners herein). That being the case, the Monitors would presumably not wish to be aligned permanently with either group of parties, but would rather feel free to leap from top to bottom of the caption in the changing phases of this most complex litigation. It is even conceivable that there may be phases of the litigation in which they can have no possible interest and, therefore, no basis for any participation—e.g., quarrels among the mem-

bers of the plaintiff class as to intervention and representation. Since, with respect to each phase of the litigation in which the Monitors have an interest, they will have to decide *ad hoc* which side to espouse and since, wherever they have an interest, none of the parties opposes their participation, what is to be gained by making them formal parties?

3. The Monitors are officers of the District Court. Making the Board of Monitors a party would be equivalent to making the District Court itself a party.

4. The law regarding parties to litigation is entitled to at least a modicum of respect from the Board of Monitors. That law makes liberal provisions for joinder of parties and intervention by parties. Anyone with an interest justifying joinder or intervention is amply protected. But he must show that he qualifies as a party. No court and no officer of a court should lightly disregard the rules by bandying about parties at will.

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SUPPLEMENTAL BRIEF OF PETITIONERS IN CONNECTION WITH PETITION FOR CERTIORARI

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SUPPLEMENTAL BRIEF OF PETITIONERS IN CONNECTION WITH PETITION FOR CERTIORARI

In the petition for certiorari filed herein on September 18, 1959, petitioners urged that this Court review the judgment of the Court of Appeals upon the ground, among others, that, under that court's construction of the consent decree, the District Court is given the non-judicial function of conducting a legislative inquiry for the purpose of discovering facts upon which presently indeterminable controversies can be framed for future judicial determination. The purpose of this supplemental brief is to bring to this

Court's attention an action by the District Court, taken after the filing of the petition for certiorari, the brief in opposition and the reply thereto, which action clearly and forcefully exemplifies petitioners' contention.

On August 13, 1959, the Board of Monitors filed in the District Court an "Interim Report . . . and Request for Instructions" in which they reported the disappearance of certain accounting records of one of the local unions comprising The International. The Monitors did not seek a determination that any of the petitioners had violated the consent decree. They requested instead that they be authorized to examine witnesses under oath and that they be given subpoenas to command the attendance of witnesses and the production of documents. The witnesses sought to be examined were not limited to the defendants in the action but included all persons who might have knowledge of the subject of the investigation. The purpose of the investigation was "that the Board of Monitors may be able to render a comprehensive report to the court of this matter."

In a hearing on November 2, 1959, the District Court overruled the petitioners' objections to the Monitors' request for such new authority and instructed the Monitors to prepare an order granting them the authority sought. As of the time of the printing of this supplemental brief, the order has not yet been signed.

Two additional "Interim Reports", in which the Monitors request the same judicially-enforced investigative authority with respect to other Teamster-

related matters, are now pending before the District Court.

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